

United States  
Circuit Court of Appeals

For the Ninth Circuit.

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THE MUTUAL LIFE INSURANCE COMPANY  
OF NEW YORK, a corporation,

Appellant,

vs.

HERBERT E. FREY,

Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United  
States for the Northern District of California,  
Southern Division.

Filed

JAN 18 1934

PAUL P. OBRIEN,  
CLERK

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# INDEX

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	Page
Answer .....	14
Amended Judgment .....	33
Amended Praecipe .....	122
Appeal:	
Order Allowing .....	137
Petition For .....	122
Assignments of Error.....	124
Bill of Exceptions.....	35
Testimony on Behalf of Defendant:	
Allen, Herbert W.	
direct .....	53
cross .....	54
Berger, Adolphus	
direct .....	43
cross .....	46
redirect .....	53
Frey, Herbert	
direct .....	104
Moody, A. M.	
direct .....	60

Index	Page
(Testimony on Behalf of Defendant—Cont.)	
Murray, Gerald W.	
direct .....	74
cross .....	77
redirect .....	78
recross .....	79
Steinfeld, Lester A.	
direct .....	61
cross .....	70
recalled—direct .....	93
cross .....	99
Testimony on Behalf of Plaintiff:	
Allen, Herbert W.	
direct .....	42
Kaufman, Bernard	
direct .....	81
cross .....	92
Steventon, John I.	
direct .....	39
redirect .....	41
Steventon, Selma	
direct .....	38
cross .....	39
recalled—direct .....	103
Bond .....	139
Complaint .....	1
Clerk's Certificate .....	141
Citation .....	142

Index	Page
Error:	
Assignments of .....	124
Exceptions:	
Bill of .....	35
Exhibits:	
Stipulation omitting from record.....	144
Defendant's Exhibits:	
A—Photostatic copy of declaration made by Walter Frey dated June 1, 1932 .....	55
A—Application for establishing or re- stating policy .....	178
B—Application for insurance policy made by Walter E. Frey dated March 5, 1932.....	63
C—Aviation Form .....	184
D—Letter dated March 8, 1932, A. D. Reiley to Manager at San Fran- cisco .....	187
E—Letter dated April 4, 1932, W. E. Frey to Mutual Life Insurance Co.	188
F—Letter A. D. Reiley to Manager at San Francisco declining risk.....	190
G—Letter dated April 8, 1932 to Mana- ger at San Francisco reconsidering and approving risk .....	191

<b>Index</b>	<b>Page</b>
(Defendant's Exhibits—Cont.)	
H—Agreement of W. E. Frey not to ride in flying machine, etc.....	192
I—Assignment Herbert E. Frey to San Francisco Milling Co.....	193
J—Slip containing instructions to agent concerning delivery of policy	76
K—Photostats of two checks dated April 11, 1932.....	200
L—Letter from Home Office Mutual Life Insurance Co. to San Francisco Manager dated June 1, 1932..	201
Plaintiff's Exhibits:	
No. 3.—Policies of Mutual Life Insurance Company on Life of Walter E. Frey:	
No. 4,591,473, payable to Selma Frey, beneficiary.....	147
No. 4,591,472, payable to Herbert Frey, beneficiary.....	160
No. 4—Assignment John J. Steventon and Selma Steventon to Herbert E. Frey .....	174
No. 5—Photostat of Memorandum re replacement of policies.....	175
No. 6—Letter dated April 16, 1932, L. A. Steinfeld to Herbert Frey.....	177
Names and Addresses of Attorneys.....	1

Index	Page
Order for Removal.....	13
Order Allowing Appeal.....	137
Petition for Appeal.....	122
Praecipe, Amended .....	138
Removal:	
Order for .....	13
Stipulation Omitting Exhibits from Record.....	144
Verdict for Defendant.....	33
Verdict for Plaintiff.....	32



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In the Superior Court of the State of California, in  
and for the City and County of San Francisco.

No. 19303-L.

HERBERT E. FREY,  
Plaintiff,  
vs.

THE MUTUAL LIFE INSURANCE COMPANY  
OF NEW YORK, a corporation,  
Defendant.

COMPLAINT.

Plaintiff complains and alleges as follows:

I.

That defendant is, and at all times herein mentioned was, a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal place of business in the State of New York, and with an office in San Francisco, California.

## II.

That heretofore and on or about the 15th day of April, 1932, defendant, in consideration of \$152.20 to it paid, made, executed and delivered to plaintiff its certain policy of insurance upon the life of one Walter E. Frey, under and by virtue of which defendant promised to pay to plaintiff, the beneficiary named therein, the sum of Ten Thousand Dollars (\$10,000.) upon receipt of due proof of the death of the said Walter E. Frey prior to the 9th day of March, 1947.

## III.

That thereafter and on or about the 20th day of May, 1932, defendant requested the return of said policy upon the representation that it was desired by it for auditing purposes; [1\*] that upon such representation plaintiff did return said policy to defendant; that said policy has never been returned by defendant to plaintiff, although demand has been made therefor upon defendant by plaintiff; that plaintiff is informed and believes and upon such information and belief alleges that said policy has been, at all times since it was given to defendant as alleged, and now is, in the possession of defendant; that plaintiff is, therefore, unable to set out in full the terms and conditions of said policy.

## IV.

That plaintiff and said Walter E. Frey has each duly performed all things on his part to be performed under said policy.

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\*Page numbering appearing at the foot of page of original certified Transcript of Record.



V.

That said Walter E. Frey died at San Francisco, California, on June 4, 1932.

VI.

That on or about the 13th day of June, 1932, plaintiff gave to defendant written notice of the death of said Walter E. Frey and notified defendant that he desired to present proof of death under said policy and plaintiff thereupon requested that defendant furnish to him its customary forms of proof of death for said purpose; that defendant nevertheless failed and refused to furnish plaintiff with such forms of proof and denied all liability upon said policy, and denied that said policy was in force or effect.

VII.

That plaintiff has demanded from defendant payment of the sum of \$10,000 under said policy but defendant has failed and refused to pay to plaintiff the said sum of \$10,000, or any part thereof, and said sum of \$10,000 is now due, owing and [2] unpaid by defendant to plaintiff.

WHEREFORE, plaintiff prays judgment against defendant on this first cause of action in the sum of \$10,000, together with interest thereon at the rate of seven percent per annum, together with his costs incurred herein, and for general relief.

And as a second and separate cause of action against defendant herein, plaintiff alleges:

VIII.

Plaintiff incorporates herein by reference each

and every allegation contained in Paragraph I. of the first cause of action herein.

### IX

That on or about the 1st day of June, 1932, defendant made, executed and delivered to plaintiff its certain policy of insurance upon the life of the aforesaid Walter E. Frey under and by virtue of which defendant promised to pay to plaintiff, the beneficiary named therein, the sum of Five Thousand Dollars (\$5,000) upon receipt of due proof of the death of said Walter E. Frey prior to the 1st day of June, 1947; that a copy of said policy of insurance is annexed hereto, marked Exhibit "A", and made a part of this complaint; that attached to said policy of insurance is an application of said Walter E. Frey for said insurance, copy of which is annexed hereto and marked Exhibit "B" and made a part of this complaint.

### X.

Plaintiff and said Walter E. Frey has each duly performed all things on his part to be performed under said policy.

### XI.

The said Walter E. Frey died at San Francisco, [3] California, on June 4, 1932.

### XII.

That on or about the 13th day of June, 1932, plaintiff gave to defendant written notice of the death of said Walter E. Frey and notified defendant that he desired to present proof of death under said policy and plaintiff thereupon requested that defendant furnish to him its customary forms of

proof of death for said purpose; that defendant nevertheless failed and refused to furnish plaintiff with such forms of proof and denied all liability upon said policy, and denied that said policy was in force or effect, and demanded that plaintiff surrender said policy to defendant without payment thereof by defendant.

### XIII.

That plaintiff has demanded from defendant payment of the sum of \$5,000 under said policy but defendant has failed and refused to pay to plaintiff the said sum of \$5,000, or any part thereof, and that no part of said sum of \$5,000 has ever been paid, and that said sum of \$5,000 is now due, owing and unpaid by defendant to plaintiff.

WHEREFORE, plaintiff prays judgment against defendant on this second cause of action in the sum of \$5,000, together with interest thereon at the rate of seven percent per annum, together with his costs incurred herein, and for general relief.

And as a third and separate cause of action against defendant herein, plaintiff alleges:

### XIV.

Plaintiff incorporates herein by reference each and every allegation contained in Paragraph I. of the first cause of action herein. [4]

### XV.

That on or about the 1st day of June, 1932, defendant made, executed and delivered to plaintiff its certain policy of insurance upon the life of the

aforesaid Walter E. Frey under and by virtue of which defendant promised to pay to plaintiff, the beneficiary named therein, the sum of Ten Thousand Dollars (\$10,000) upon receipt of due proof of the death of said Walter E. Frey prior to the 1st day of June, 1947; that a copy of said policy of insurance is annexed hereto, marked Exhibit "C", and made a part of this complaint; that attached to said policy of insurance is an application of said Walter E. Frey for said insurance, copy of which is annexed hereto and marked Exhibit "D" and made a part of this complaint.

#### XVI.

Plaintiff and said Walter E. Frey has each duly performed all things on his part to be performed under said policy.

#### XVII.

That said Walter E. Frey died at San Francisco, California, on June 4, 1932.

#### XVIII.

That on or about the 13th day of June, 1932, plaintiff gave to defendant written notice of the death of said Walter E. Frey and notified defendant that he desired to present proof of death under said policy and plaintiff thereupon requested that defendant furnish to him its customary forms of proof of death for said purpose; that defendant nevertheless failed and refused to furnish plaintiff with such forms of proof and denied all liability upon said policy, and denied that said policy was in force or effect, and demanded that plaintiff surrender said policy to defendant without payment thereof by defendant. [5]

XIX.

That plaintiff has demanded from defendant payment of the sum of \$10,000 under said policy but defendant has failed and refused to pay to plaintiff the said sum of \$10,000 or any part thereof, and that no part of said sum of \$10,000 has ever been paid, and that said sum of \$10,000 is now due, owing and unpaid by defendant to plaintiff.

WHEREFORE, plaintiff prays judgment against defendant on this third cause of action in the sum of \$10,000, together with interest thereon at the rate of seven percent per annum, together with his costs incurred herein, and for general relief.

And as a fourth and separate cause of action against defendant herein, plaintiff alleges:

XX.

Plaintiff incorporates herein by reference each and every allegation contained in Paragraph I. of the first cause of action herein.

XXI.

That heretofore and on or about the 15th day of April, 1932, defendant in consideration of \$152.20 to it paid, made, executed and delivered to one Selma Frey Steventon its certain policy of insurance upon the life of the aforesaid Walter E. Frey under and by virtue of which defendant promised to pay to said Selma Frey Steventon the sum of Ten Thousand Dollars (\$10,000) upon receipt of due proof of the death of said Walter E. Frey prior to the 9th day of March, 1947.



## XXII.

That thereafter and on or about the 20th day of May, 1932, defendant requested the return of said policy upon the representation that it was desired by it for auditing purposes; [6] that upon such representation said Selma Frey Steventon did return said policy to defendant; that said policy has never been returned by defendant to said Selma Frey Steventon, although demand has been made therefor upon defendant by said Selma Frey Steventon; that plaintiff is informed and believes and upon such information and belief alleges that said policy has been, at all times since it was given to defendant as alleged, and now is, in the possession of defendant; that plaintiff is, therefore, unable to set out in full the terms and conditions of said policy; that plaintiff is informed and believes and upon such information and belief alleges that by the terms of said policy of insurance the beneficiary is described as "Thelma Frey, the sister of the insured"; and plaintiff alleges that said Selma Frey Steventon is the person named in said policy as the beneficiary.

## XXIII.

That plaintiff and Selma Frey Steventon and said Walter E. Frey has each duly performed all things on his part to be performed under said policy.

## XXIV.

That said Walter E. Frey died at San Francisco, California, on June 4, 1932.

XXV.

That on or about the 13th day of June, 1932, said Selma Frey Steventon gave to defendant written notice of the death of said Walter E. Frey and notified defendant that she desired to present proof of death under said policy and Selma Frey Steventon thereupon requested that defendant furnish to her its customary forms of proof of death for said purpose; that defendant nevertheless failed and refused to furnish said Selma Frey Steventon with such forms of proof and denied all [7] liability upon said policy, and denied that said policy was in force or effect.

XXVI.

That said Selma Frey Steventon has demanded from defendant payment of the sum of \$10,000 under said policy but defendant has failed and refused to pay to said Selma Frey Steventon the said sum of \$10,000, or any part thereof, and that said sum of \$10,000 is now due, owing and unpaid.

XXVII.

That heretofore and prior to the commencement of this action said Selma Frey Steventon assigned and transferred to plaintiff her said claim and demand against said defendant, arising out of and/or under said policy of insurance, and plaintiff has ever since been, and now is, the owner thereof.

WHEREFORE, plaintiff prays judgment against defendant on this fourth cause of action in the sum of \$10,000, together with interest thereon at the rate of seven percent per annum, together with his costs incurred herein, and for general relief.

And as a fifth and separate cause of action against defendant herein, plaintiff alleges:

### XXVIII.

Plaintiff incorporates herein by reference each and every allegation contained in Paragraph I. of the first cause of action herein.

### XXIX.

That on or about the 1st day of June, 1932, defendant made, executed and delivered to one John I. Steventon its certain policy of insurance upon the life of the aforesaid Walter E. Frey under and by virtue of which defendant promised to pay to said John I. Steventon, the beneficiary named therein, the sum of [8] Five Thousand Dollars (\$5,000) upon receipt of due proof of the death of said Walter E. Frey prior to the 1st day of June, 1947; that a copy of said policy of insurance is annexed hereto, marked Exhibit "E", and made a part of this complaint; that attached to said policy of insurance is an application of said Walter E. Frey for said insurance, copy of which is annexed hereto and marked Exhibit "F", and made a part of this complaint.

### XXX.

That plaintiff and said John I. Steventon and said Walter E. Frey has each duly performed all things on his part to be performed under said policy.

### XXXI.

That said Walter E. Frey died at San Francisco, California, on June 4, 1932.



## XXXII.

That on or about the 13th day of June, 1932, said John I. Steventon gave to defendant written notice of the death of said Walter E. Frey and notified defendant that he desired to present proof of death under said policy and said John I. Steventon thereupon requested that defendant furnish to him its customary forms of proof of death for said purpose; that defendant nevertheless failed and refused to furnish said John I. Steventon with such forms of proof and denied all liability upon said policy, and denied that said policy was in force or effect, and demanded that said John I. Steventon surrender said policy to defendant without payment thereof by defendant.

## XXXIII.

That said John I. Steventon has demanded from defendant payment of the sum of \$5,000 under said policy but defendant has failed and refused to pay to said John I. Steventon the said sum of \$5,000, or any part thereof, and that no part of said sum of [9] \$5,000 has ever been paid and that said sum of \$5,000 is now due, owing and unpaid.

## XXXIV.

That heretofore and prior to the commencement of this action said John I. Steventon assigned and transferred to plaintiff his said claim and demand against said defendant, arising out of and/or under said policy of insurance and plaintiff has ever since been, and now is, the owner thereof.

WHEREFORE, plaintiff prays judgment against

defendant on this fifth cause of action in the sum of \$5,000, together with interest thereon at the rate of seven percent per annum, together with his costs incurred herein, and for general relief.

Dated: June 28, 1932.

CARL R. SCHULZ,  
NORMAN A. EISNER,  
Attorneys for Plaintiff. [10]

State of California,  
City and County of San Francisco.—ss.

HERBERT E. FREY, being duly sworn; deposes and says: that he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

HERBERT E. FREY.

Subscribed and sworn to before me this 16th day of July, 1932.

[Seal]

KATHRYN E. STONE,  
Notary Public in and for the City and County  
of San Francisco, State of California.

[Endorsed]: Filed in Superior Court Jul. 18, 1932. [11]

[Title of Court and Cause.]

ORDER FOR REMOVAL

Defendant above-named, The Mutual Life Insurance Company of New York, a corporation, having filed herein its petition for removal in the above-entitled cause to the Southern Division of the United States District Court, for the Northern District of California, and having filed therewith a good and sufficient bond, conditioned as required by law, and having given due notice of the time and place for the presentation of said petition and bond; now, therefore, it is

ORDERED That the above-entitled cause be transferred to the Southern Division of the United States District Court, for the Northern District of California, for further proceedings; and it is further

ORDERED That the bond and undertaking on removal tendered herewith be and the same is hereby approved.

Dated July 3rd, 1932.

C. J. GOODELL,

Judge of the Superior Court of the State of California, in and for the City and County of San Francisco.

[Endorsed]: Filed Superior Court August 3, 1932.

[Endorsed]: Filed United States District Court August 15, 1932. [27]

In the Southern Division of the United States District Court, in and for the Northern District of California.

No. 19303-L

HERBERT E. FREY,

Plaintiff,

vs.

THE MUTUAL LIFE INSURANCE COMPANY  
OF NEW YORK, a corporation,  
Defendant.

### ANSWER

Comes now defendant and answers the first count in the complaint herein as follows:

#### I.

Admits the allegations of section "I".

#### II.

Denies that defendant ever executed or delivered to plaintiff or to Walter E. Frey any policy of insurance upon the life of Walter E. Frey for or upon any consideration paid or to be paid; and denies that defendant ever promised to pay to plaintiff any sum upon receipt of proof of death of Walter E. Frey, or otherwise, at any time.

#### III.

Denies that defendant ever requested the return of any policy upon the representation that it was desired for auditing purposes. Denies that upon such representation plaintiff did return any policy to defendant, or any one.

IV.

Denies that plaintiff and Walter E. Frey, or either of them, ever duly or otherwise performed any of the things on their or his part to be performed under said policy or otherwise. [28]

V.

Admits the allegations of section "V."

VI.

Admits the allegations of section "VI".

VII.

Denies that any sum is or ever was due or owing or unpaid by defendant to plaintiff.

---

BY WAY OF SPECIAL SEPARATE DEFENSE, defendant alleges that on or about the 5th day of March, 1932, said Walter E. Frey made written application to plaintiff for certain insurance upon his life; that a copy of said application is annexed to and made a part of the complaint herein, and marked "Exhibit B"; that in and by said application said Walter E. Frey understood and agreed among other things as follows:

"This application is made to The Mutual Life Insurance Company of New York, herein called the Company. All the following statements and answers, and all those that the insured makes to the Company's medical examiner, in continuation of this application, are

true and are offered to the Company as an inducement to issue the proposed policy. The insured expressly waives on behalf of himself or herself and of any person who shall have or claim any interest in any policy issued hereunder, all provisions of law forbidding any physician or other person who has attended or examined, or who may hereafter attend or examine the insured, from disclosing any knowledge or information which he thereby acquired. The proposed policy shall not take effect unless and until delivered to and received by the insured, the beneficiary or by the person who herein agrees to pay the premiums, during the insured's continuance in good health and unless and until the first premium shall have been paid during the insured's continuance in good health."

"It is agreed that in the event of the self-destruction of the insured during the first year following the date of issue of the policy hereby applied for whether sane or insane the Company's liability shall be limited to the amount of the premiums paid. It is [29] agreed that no agent or other person except the President, Vice-President, a Second Vice-President or a Secretary of the Company has power on behalf of the Company to bind the Company by making any promise respecting benefits under any policy issued hereunder or accepting any representations or information not contained in this application, or to make, modify or dis-



charge any contract of insurance, or to extend the time for payment of a premium, or to waive any lapse or forfeiture or any of the Company's rights or requirements."

That no premium or money was ever paid to defendant by plaintiff nor by Walter E. Frey, in connection with any insurance so applied for by him, or otherwise; that neither plaintiff nor Walter E. Frey ever made any other application for insurance upon the life of Walter E. Frey; that prior to and on said 5th day of March, 1932, and continuously thereafter up to the time of his death, said Walter E. Frey was not in good health, but, on the contrary, said Walter E. Frey was, prior to and on said 5th day of March, 1932, and continuously thereafter up to the time of his death, afflicted with coronary sclerosis and chronic myocarditis, and died from acute dilation of the heart, coronary sclerosis with occlusion, and chronic myocarditis; that such fact was not known to defendant until after the death of Walter E. Frey.

---

Comes now the defendant and answers the second count in said complaint as follows:

VIII.

Admits the allegations of section "VIII".

IX.

Denies that on or about the 1st day of June, 1932,

defendant made or executed or delivered to plaintiff any policy of insurance on the life of Walter E. Frey. Denies that by virtue of said policy, or otherwise, defendant promised to pay to [30] plaintiff any sum under any circumstances. In this connection defendant alleges that on the 4th day of June, 1932, and after the death of Walter E. Frey, one Steinfeld, without authority, and contrary to the terms of the written application hereinafter referred to, transmitted physical possession of the policy annexed to the complaint, and marked "Exhibit A", to plaintiff, and in this same connection defendant further alleges that on or about the 5th day of March, 1932, said Walter E. Frey made written application to plaintiff for certain insurance upon his life; that a copy of said application is annexed to and made a part of the complaint herein, and marked "Exhibit B"; that in and by said application said Walter E. Frey understood and agreed among other things as follows:

"This application is made to The Mutual Life Insurance Company of New York, herein called the Company. All the following statements and answers, and all those that the insured makes to the Company's medical examiner, in continuation of this application, are true and are offered to the Company as an inducement to issue the proposed policy. The insured expressly waives on behalf of himself or herself and of any person who shall have or claim any interest in any policy issued hereunder, all provisions of law forbidding any



physician or other person who has attended or examined, or who may hereafter attend or examine the insured, from disclosing any knowledge or information which he thereby acquired. The proposed policy shall not take effect unless and until delivered to and received by the insured, the beneficiary or by the person who herein agrees to pay the premiums, during the insured's continuance in good health and unless and until the first premiums shall have been paid during the insured's continuance in good health."

"It is agreed that in the event of the self-destruction of the insured during the first year following the date of issue of the policy hereby applied for whether sane or insane the Company's liability shall be limited to the amount of the premiums paid. It is agreed that no agent or other person except the President, Vice-President, a Second Vice-President, or a Secretary of the Company has power on behalf of the Company to bind the Company by making any promise respecting benefits under any policy issued hereunder or accepting any representations or information not contained [31] in this application, or to make, modify or discharge any contract of insurance, or to extend the time for payment of a premium, or to waive any lapse or forfeiture or any of the Company's rights or requirements."

That no premium or money was ever paid to defendant by plaintiff nor by Walter E. Frey, in con-

nection with any insurance so applied for by him, or otherwise; that neither plaintiff nor Walter E. Frey ever made any other application for insurance upon the life of Walter E. Frey; that prior to and on said 5th day of March, 1932, and continuously thereafter up to the time of his death, said Walter E. Frey was not in good health, but, on the contrary, said Walter E. Frey was, prior to and on said 5th day of March, 1932, and continuously thereafter up to the time of his death, afflicted with coronary sclerosis and chronic myocarditis, and died from acute dilation of the heart, coronary sclerosis with occlusion, and chronic myocarditis; that such fact was not known to defendant until after the death of Walter E. Frey.

#### X.

Denies that plaintiff and Walter E. Frey, or either of them, ever duly or otherwise performed any of the things on their or his part to be performed under said policy or otherwise.

#### XI.

Admits the allegations of section "XI".

#### XII.

Admits the allegations of section "XII".

#### XIII.

Denies that any sum is or ever was due or owing or unpaid by defendant to plaintiff. [32]

Comes now the defendant and answers the third count in said complaint as follows:

XIV.

Admits the allegations of section "XIV".

XV.

Denies that on or about the 1st day of June, 1932, defendant made or executed or delivered to plaintiff any policy of insurance on the life of Walter E. Frey. Denies that by virtue of said policy, or otherwise, defendant promised to pay to plaintiff any sum under any circumstances. In this connection defendant alleges that on the 4th day of June, 1932, and after the death of Walter E. Frey, one Steinfeld, without authority, and contrary to the terms of the written application hereinafter referred to, transmitted physical possession of the policy annexed to the complaint, and marked "Exhibit C", to plaintiff, and in this same connection defendant further alleges that on or about the 5th day of March, 1932, said Walter E. Frey made written application to plaintiff for certain insurance upon his life; that a copy of said application is annexed to and made a part of the complaint herein, and marked "Exhibit D"; that in and by said application said Walter E. Frey understood and agreed among other things as follows:

"This application is made to The Mutual Life Insurance Company of New York, herein called the Company. All the following statements and answers, and all those that the in-

sured makes to the Company's medical examiner, in continuation of this application, are true and are offered to the Company as an inducement to issue the proposed policy. The insured expressly waives on behalf of himself or herself and of any person who shall have or claim any interest in any policy issued hereunder, all provisions of law forbidding any physician or other person who has attended or examined, or who may hereafter attend or examine the insured, from disclosing any knowledge or information which he thereby acquired. The proposed policy shall [33] not take effect unless and until delivered to and received by the insured, the beneficiary or by the person who herein agrees to pay the premiums, during the insured's continuance in good health and unless and until the first premium shall have been paid during the insured's continuance in good health."

"It is agreed that in the event of the self-destruction of the insured during the first year following the date of issue of the policy hereby applied for whether sane or insane the Company's liability shall be limited to the amount of the premiums paid. It is agreed that no agent or other person except the President, Vice-President, a Second Vice-President, or a Secretary of the Company has power on behalf of the Company to bind the Company by making any promise respecting benefits under any policy issued hereunder or accepting any rep-

resentations or information not contained in this application, or to make, modify or discharge any contract of insurance, or to extend the time for payment of a premium, or to waive any lapse or forfeiture or any of the Company's rights or requirements.''

That no premium or money was ever paid to defendant by plaintiff nor by Walter E. Frey, in connection with any insurance so applied for by him, or otherwise; that neither plaintiff nor Walter E. Frey ever made any other application for insurance upon the life of Walter E. Frey; that prior to and on said 5th day of March, 1932, and continuously thereafter up to the time of his death, said Walter E. Frey was not in good health, but, on the contrary, said Walter E. Frey was, prior to and on said 5th day of March, 1932, and continuously thereafter up to the time of his death, afflicted with coronary sclerosis and chronic myocarditis, and died from acute dilation of the heart, coronary sclerosis with occlusion, and chronic myocarditis; that such fact was not known to defendant until after the death of Walter E. Frey.

#### XVI.

Denies that plaintiff and Walter E. Frey, or either of them, ever duly or otherwise performed any of the things on their or his part to be performed under said policy or otherwise. [34]

#### XVII.

Admits the allegations of section "XVII".

## XVIII.

Admits the allegations of section "XVIII".

## XIX.

Denies that any sum is or ever was due or owing or unpaid by defendant to plaintiff.

---

Comes now the defendant and answers the fourth count in the complaint herein as follows:

## XX.

Admits the allegations of section "XX".

## XXI.

Denies that defendant ever executed or delivered to Selma Frey Steventon or to Walter E. Frey any policy of insurance upon the life of Walter E. Frey for or upon any consideration paid or to be paid; and denies that defendant ever promised to pay to Selma Frey Steventon any sum upon receipt of proof of death of Walter E. Frey, or otherwise, at any time.

## XXII.

Denies that defendant ever requested the return of any policy upon the representation that it was desired for auditing purposes. Denies that upon such representation Selma Frey Steventon did return any policy to defendant, or any one.

## XXIII.

Denies that plaintiff and Walter E. Frey and Selma Frey Steventon, or either or any of them,



ever duly or otherwise performed any of the things on their or his part to be [35] performed under said policy or otherwise.

XXIV.

Admits the allegations of section "XXIV".

XXV.

Admits the allegations of section "XXV."

XXVI.

Denies that any sum is or ever was due or owing or unpaid by defendant to plaintiff.

XXVII.

Denies, for lack of information or belief, the allegations of section "XXVII".

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BY WAY OF SPECIAL SEPARATE DEFENSE, defendant alleges that on or about the 5th day of March, 1932, said Walter E. Frey made written application to plaintiff for certain insurance upon his life; that a copy of said application is annexed to and made a part of the complaint herein, and marked "Exhibit B"; that in and by said application said Walter E. Frey understood and agreed among other things as follows:

"This application is made to The Mutual Life Insurance Company of New York, herein called the Company. All the following statements and answers, and all those that the in-

sured makes to the Company's medical examiner, in continuation of this application, are true and are offered to the Company as an inducement to issue the proposed policy. The insured expressly waives on behalf of himself or herself and of any person who shall have or claim any interest in any policy issued hereunder, all provisions of law forbidding any physician or other person who has attended or examined, or who may hereafter attend or examine the insured, from disclosing any knowledge or information which he thereby acquired. The proposed policy shall not take effect unless and until delivered to and received by the insured, the beneficiary or by the person who herein agrees to pay the premiums, during the insured's continuance in good health and unless and [36] until the first premium shall have been paid during the insured's continuance in good health."

"It is agreed that in the event of the self-destruction of the insured during the first year following the date of issue of the policy hereby applied for whether sane or insane the Company's liability shall be limited to the amount of the premiums paid. It is agreed that no agent or other person except the President, Vice-President, a Second Vice-President, or a Secretary of the Company has power on behalf of the Company to bind the Company by making



any promise respecting benefits under any policy issued hereunder or accepting any representations or information not contained in this application, or to make, modify or discharge any contract of insurance, or to extend the time for payment of a premium, or to waive any lapse or forfeiture or any of the Company's rights or requirements."

That no premium or money was ever paid to defendant by plaintiff nor by Walter E. Frey, nor by Selma Frey Steventon, in connection with any insurance so applied for by him, or otherwise; that neither plaintiff nor Walter E. Frey, nor Selma Frey Steventon, ever made any other application for insurance upon the life of Walter E. Frey; that prior to and on said 5th day of March, 1932, and continuously thereafter up to the time of his death, said Walter E. Frey was not in good health, but, on the contrary, said Walter E. Frey was, prior to and on said 5th day of March, 1932, and continuously thereafter up to the time of his death, afflicted with coronary sclerosis and chronic myocarditis, and died from acute dilation of the heart, coronary sclerosis with occlusion, and chronic myocarditis; that such fact was not known to defendant until after the death of Walter E. Frey.

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Comes now the defendant and answers the fifth count in said complaint as follows:

## XXVIII.

Admits the allegations of section "XXVIII".  
[37]

## XXIX.

Denies that on or about the 1st day of June, 1932, defendant made or executed or delivered to John I. Steventon any policy of insurance on the life of Walter E. Frey. Denies that by virtue of said policy, or otherwise, defendant promised to pay to John I. Steventon any sum under any circumstances. In this connection defendant alleges that on the 4th day of June, 1932, and after the death of Walter E. Frey, one Steinfeld, without authority, and contrary to the terms of the written application hereinafter referred to, transmitted physical possession of the policy annexed to the complaint, and marked "Exhibit E", to John I. Steventon, and in this same connection defendant further alleges that on or about the 5th day of March, 1932, said Walter E. Frey made written application to plaintiff for certain insurance upon his life; that a copy of said application is annexed to and made a part of the complaint herein, and marked "Exhibit E"; that in and by said application said Walter E. Frey understood and agreed among other things as follows:

"This application is made to The Mutual Life Insurance Company of New York, herein called the Company. All the following statements and answers, and all those that the insured makes to the Company's medical examiner, in continuation of this application, are

true and are offered to the Company as an inducement to issue the proposed policy. The insured expressly waives on behalf of himself or herself and of any person who shall have or claim any interest in any policy issued hereunder, all provisions of law forbidding any physician or other person who has attended or examined, or who may hereafter attend or examine the insured, from disclosing any knowledge or information which he thereby acquired. The proposed policy shall not take effect unless and until delivered to and received by the insured, the beneficiary or by the person who herein agrees to pay the premiums, during the insured's continuance in good health and unless and until the first premium shall have been paid during the insured's continuance in good health."

"It is agreed that in the event of the self-[38] destruction of the insured during the first year following the date of issue of the policy hereby applied for whether sane or insane the Company's liability shall be limited to the amount of the premiums paid. It is agreed that no agent or other person except the President, Vice-President, a Second Vice-President, or a Secretary of the Company has power on behalf of the Company to bind the Company by making any promise respecting benefits under any policy issued hereunder or accepting any representations or information not contained in this application, or to make, modify or discharge any

contract of insurance, or to extend the time for payment of a premium, or to waive any lapse or forfeiture or any of the Company's rights or requirements."

That no premium or money was ever paid to defendant by John I. Steventon, nor by Walter E. Frey, in connection with any insurance so applied for by him, or otherwise; that neither John I. Steventon, nor Walter E. Frey, ever made any other application for insurance upon the life of Walter E. Frey; that prior to and on said 5th day of March, 1932, and continuously thereafter up to the time of his death, said Walter E. Frey was not in good health, but, on the contrary, said Walter E. Frey was, prior to and on said 5th day of March, 1932, and continuously thereafter up to the time of his death, afflicted with coronary sclerosis and chronic myocarditis, and died from acute dilation of the heart, coronary sclerosis with occlusion, and chronic myocarditis; that such fact was not known to defendant until after the death of Walter E. Frey.

### XXX.

Denies that plaintiff and Walter E. Frey and John I. Steventon, or either or any of them, ever duly or otherwise performed any of the things on their part or his part to be performed under said policy or otherwise.

### XXXI.

Admits the allegations of section "XXXI". [39]

XXXII.

Admits the allegations of section "XXXII".

XXXIII.

Denies that any sum is or ever was due or owing or unpaid by defendant to plaintiff.

XXXIV.

Denies, for lack of information or belief, the allegations of section "XXXIV".

WHEREFORE, defendant prays that it be hence dismissed with its costs.

F. ELDRED BOLAND,  
KNIGHT, BOLAND & RIORDAN,  
Attorneys for Defendant. [40]

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State of California,  
City and County of San Francisco.—ss.

F. ELDRED BOLAND, being first duly sworn, deposes and says:

That he is one of the attorneys for The Mutual Life Insurance Company of New York, a corporation, defendant in the within action; that there is no officer of said defendant corporation within the City and County of San Francisco, State of California, where affiant has his office, and that for that reason affiant makes this affidavit in its behalf.

That he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to those matters stated

therein on information or belief, and as to such matters, that he believes it to be true.

F. ELDRED BOLAND.

Subscribed and sworn to before me this 12th day of September, 1932.

[Seal]

MARION CURTIS,

Notary Public

In and for the City and County of  
San Francisco, State of California.

Due service and receipt of a copy of the within Answer is hereby admitted this 14th day of September, 1932.

NORMAN A. EISNER,

CARL R. SCHULZ,

Attorneys for Plaintiff.

[Endorsed]: Filed Sept. 14, 1932. [41]

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[Title of Court and Cause.]

VERDICT

We, the Jury, find in favor of the plaintiff..... and assess the damages against the Defendant in the sum of (\$20,000.00) Twenty Thousand Dollars on account of Policies Numbered 4,591472 and 4,591473. (\$20,000.00) Dollars.

H. R. BROWNE,

Foreman.

[Endorsed]: Filed May 22, 1933, at 3 o'clock and 30 minutes P. M. [42]



[Title of Court and Cause.]

VERDICT

We, the Jury, find in favor of the Defendant.....  
as to policies numbered 4,615420, 4,615421, and  
4600870.

H. R. BROWNE,  
Foreman.

[Endorsed]: Filed May 22, 1933, at 3 o'clock and  
30 minutes P. M. [43]

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In the Southern Division of the United States Dis-  
trict Court for the Northern District of Cali-  
fornia.

No. 19303-L

HERBERT E. FREY,  
Plaintiff,

vs.

THE MUTUAL LIFE INSURANCE COMPANY  
OF NEW YORK, a corporation,  
Defendant.

AMENDED JUDGMENT ON VERDICT

This cause having come on regularly for trial on  
the 16th day of May, 1933, being a day in the March,  
1933, Term of said Court, before the Court and a  
Jury of twelve men duly impaneled and sworn to  
try the issues joined herein; Norman A. Eisner and  
Carl R. Schulz, Esquires, appearing as attorneys



for plaintiff, and F. E. Boland, Esq., appearing as attorney for defendant, and the trial having been proceeded with on the 18th, 19th and 22nd days of May, in said year and term, and oral and documentary evidence on behalf of the respective parties having been introduced and closed, and the cause, after arguments by the attorneys and the instructions of the Court, having been submitted to the Jury and the Jury having subsequently rendered the following verdicts, which were ordered recorded, namely: "We, the Jury, find in favor of the Plaintiff and assess the damages against the Defendant in the sum of (\$20,000.00) Twenty Thousand Dollars on account of Policies Numbered 4,591472 and 4,591473 (\$20,000.00) Dollars. H. R. Browne, Foreman.", and "We, the Jury, find in favor of the Defendant as to policies numbered 4,615420, 4,615421, and 4600870. H. R. Browne, Foreman.", and the Court having ordered that judgment be entered herein in accordance with said verdicts in favor of plaintiff in the sum of \$20,000.00, together with interest at the rate of 7% per annum from June 13, 1932, to May 22, 1933, and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that Herbert E. Frey, Plaintiff, do have and recover of and from The Mutual Life Insurance Company of New York, a corporation, Defendant, the sum of Twenty-One Thousand Three Hundred Eighteen and  $\frac{33}{100}$  (\$21,318.33) Dollars, together with his costs herein expended taxed at \$87.40.

Judgment entered this 6th day of June, 1933,  
nunc pro tunc May 22, 1933.

WALTER B. MALING,  
Clerk.

Pursuant to an order signed and filed on June  
28th, 1933, the within judgment is amended, modi-  
fied and reduced to the sum of \$20,993.87 instead of  
\$21,318.33.

WALTER B. MALING,  
Clerk.

[Endorsed]: Filed June 6, 1933, nunc pro tunc  
May 22, 1933. [44]

[Title of Court and Cause.]

ENGROSSED BILL OF EXCEPTIONS

BE IT REMEMBERED, That the above-entitled  
cause came on regularly for trial before the above-  
entitled court, on the 16th day of May, 1933, and  
after a jury was duly and regularly impaneled and  
sworn, the following proceedings were had:

Plaintiff offered in evidence policy No. 4,615,421,  
policy No. 4,600,870 and policy No. 4,615,420.

MR. BOLAND: I object to the offer and intro-  
duction in evidence upon the grounds, first, that it  
does not appear that the policies are in conformity  
with the application which is printed therein. Sec-  
ond: there is no showing that the premium thereon  
was paid. Third: It does not appear that any  
of the policies were delivered. Fourth: Upon the  
ground that the premium thereon was not paid  
while the insured was in good health, and that

the burden of proof is upon the plaintiff to establish that delivery occurred while the applicant was in good health. Fifth: That the premium was not paid while the applicant was in good health. [46]

The objection was overruled and exception allowed, and the policies introduced in evidence, and copies of each are annexed to and are a part of the complaint herein.

Plaintiff thereupon offered in evidence copies of policies numbers 4,591,472 and 4,591,473, following stipulation of counsel that they were copies of policies dated March 8, 1932, and were furnished by defendant to plaintiff pursuant to an order of this court, that the originals had been destroyed, that the copies of the applications annexed thereto were annexed in error and that the true applications were the same as annexed to the other policies exhibits 1 and 2; that the marks "cancelled" appearing upon the signatures were not upon the originals at the time the policies were in the hands of plaintiff, and that the beneficiary as shown on the original of exhibit 3 was Thelma Frey.

THE COURT: (referring to exhibits 3 and 4) We will consider them as copies of the originals.

MR. BOLAND: As to these, I will make the same objection, if I may do it in that manner, without repeating the grounds of objection.

THE COURT: Yes, you may, of course.

MR. BOLAND: And I add to the objection that these are copies and the original is not accounted for, and there can be no assumption of delivery by the mere fact of possession, and therefore there is

no foundation laid for their introduction; also, upon the further ground, as it appears in the policies themselves, the application was for \$35,000, payable to the San Francisco Milling Company, which is not involved here, and the two \$10,000 policies, and not for five policies, and that, therefore, either these policies are not admissible or the plaintiff must be put to his election as to which \$20,000 he will rely upon.

The objection was overruled; exception allowed; policies introduced in evidence and marked "Plaintiff's Exhibit 3" and "Plaintiff's Exhibit 4." (Here insert.) [47]

Thereupon plaintiff offered in evidence the assignment of John I. Steventon of the policy in the sum of \$5,000 dated June 1, 1932, the assignment being dated June 27, 1932, and the assignment of Selma Steventon of the policy in the sum of \$10,000 dated on or about the 9th day of March, 1932, the assignment being dated June 27, 1932, both assignments being to the plaintiff. Plaintiff then rested and defendant moved for dismissal of the case. Following argument by counsel for both sides the Court permitted and ruled that the answer of the defendant should be considered as amended to deny the execution and delivery of all the policies. Thereupon plaintiff withdrew his submission of the case and defendant withdrew its motion to dismiss the action.

## SELMA STEVENTON,

being called as a witness for plaintiff, being first duly sworn, testified as follows:

I am the sister of the deceased, Walter E. Frey. I recognize Plaintiff's Exhibits 3 and 4 (policies 4,591,472 and 4,591,473) as being copies of policies which I have seen under the following circumstances: Around April 15 or 16, 1932, Mr. Steinfeld came into the office. He had five or six policies in his hands. He threw them down on my desk and said, "Here are the policies, they are paid for." My brother was there at the time and said, "Gee, that's pretty good, what do you think of that, Selma?" I said, "That's fine." He took the policies and gave them to me and I put them in the safe. Those were the originals of Exhibits 3 and 4. I understood he was connected with the defendant as an agent. The policies were in the safe about a month. Then one day I received a telephone call from Mr. Steinfeld. He first asked for my brother Herbert. He was in Los Angeles at the time. Then he asked for my son, John Steventon, but John was away. So then he spoke to me. He said, "Mrs. Steventon, will you do me a favor?" I said, "Yes, what is it?" He said, "Return those policies, I must have those policies for auditing purposes only, I will return them." I said, "I have no one to send them with." He said, "Can't you get someone, I must have these policies." It was a Saturday morning, I think, and we were quite busy. I said, "All right, Mr. Steinfeld, I will do the best I can." I asked Mr. Straight to take those policies up to Mr. Steinfeld, he wants them for auditing purposes



(Testimony of Selma Steventon.)

only. He said, "All right, I will do that." So I gave them to Mr. Straight and he took them to Mr. Steinfeld. There was no discussion in her conversation with Mr. Steinfeld as to any proposed cancellation of the policies.

I did not know Mr. Steinfeld very long. I considered him a friend of long standing of my brother Herbert, and for that reason I returned the policies to him.

Upon CROSS-EXAMINATION,  
the witness testified as follows:

I never paid anything to Mr. Steinfeld.

I did not pay any premiums. I don't know whether Walter Frey ever paid the premium. He brought the policies to us and I thanked him for his kindness. He said, "They are all paid for," and threw them on the desk.

I don't know where Walter Frey was at the time the policies were left. I don't know where he was. The policies remained in the safe during the time they were left in my possession and Mr. Straight reported that he had given them to Mr. Steinfeld, I never saw the policies again.

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JOHN I. STEVENTON, being called as a witness for plaintiff, being first duly sworn, testified as follows:

I was, in May and June, 1932, and am now em-

(Testimony of John I. Steventon.)

ployed by San Francisco Milling Company, and am the beneficiary named in one of the policies of insurance here involved. About the 24th or 25th [49] of May, 1932, I came back and my mother, Mrs. Steventon (the preceding witness), told me she had given up these policies to Mr. Steinfeld. I had several telephone conversations with Mr. Steinfeld in which I asked him why he had taken the policies from our organization without an O. K. from Mr. Frey or myself. He stated that he had taken them for auditing purposes and for me not to worry; we were covered with insurance, and he would have the policies back to us in a short time. Mr. Steinfeld did not return the policies. Between May 25 and June 1 I was in touch with Mr. Steinfeld every day. Finally he said it was necessary to have a re-examination of Walter Frey, my uncle. He told us that the examination that Walter Frey took on March 4 or 5, that the time had expired, and they had to have another doctor's examination for the issuance of the second policies. He did not indicate it had anything to do with the first policy. I was present at the time testified by my mother when the policies were left with her by Mr. Steinfeld. I did not see him throw the policies on the desk. Mr. Steinfeld walked into Mr. Frey's office. Mr. Steinfeld said he had paid for them and, further, he had a receipt from the company showing the policies had been paid. The conversation about the assignment occurred after that time, about the 15th or 16th of April. I was away for one or two days, the day



(Testimony of John I. Steventon.)

that Mr. Steinfeld received delivery of the policies from my mother through Mr. Straight. I had a later conversation with Mr. Steinfeld. He asked whether I wanted insurance on Walter Frey's life, and the next morning I notified Mr. Steinfeld that I decided I wanted the policy on Walter E. Frey's life, with me as beneficiary. [50] I don't remember whether an application was made. This conversation took place the latter part of May. And I decided, and told Mr. Steinfeld, that I wanted some insurance on Walter Frey's life, the policies—the ones that were issued as of June 1. The second physical examination of Walter Frey was June 1. Mr. Steinfeld told me over the telephone that Walter Frey had passed the examination 100 per cent.

Upon Redirect Examination,

the witness testified as follows:

I don't know of any application made by Walter Frey for insurance around June 1.

Thereupon plaintiff rested.

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Mr. BOLAND: I will now make a motion for dismissal of the case upon the ground that it has not been made to appear by any evidence that there was a delivery of any policy with intent to consummate a contract of insurance. I am referring to all of the policies, instead of naming each one, if I may do it that way, your Honor. There is no evi-

dence that there was any delivery of any of the policies with intent to consummate a contract of insurance. There is no evidence of the acceptance of any of the policies by Walter E. Frey, or by anyone on his behalf, with intent to consummate a contract of insurance. There is no evidence that any premium was paid upon any policy. That no policy was delivered to Walter E. Frey, or to anyone on his behalf, or accepted by him or anyone on his behalf. No policy was delivered to Walter E. Frey or to anyone on his behalf while he was in good health. No policy was accepted by Walter E. Frey or anyone on his behalf while he was in good health. No premium upon any policy was paid by said Walter E. Frey or anyone in his [51] behalf while he was in good health. No policy was delivered to Walter E. Frey or to anyone on his behalf, or accepted by him or by anyone on his behalf, or the premium thereon paid, while Walter E. Frey was in good health.

After argument of the motion, plaintiff asked permission, which was granted, to re-open the case.

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HERBERT W. ALLEN,

being called as a witness for plaintiff, being first duly sworn, testified as follows:

I am a duly licensed physician, practicing in San Francisco over thirty years, and am a graduate of Johns Hopkins Medical School. I am in the employ

(Testimony of Herbert W. Allen.)

of defendant, and have been for something over twenty years. I have a personal recollection of making a physical examination of Walter E. Frey about the 4th day of March, 1932. It was the usual insurance examination. The first thing we do is to obtain the applicant's medical history, family history, moral history, etc. Then we make a physical examination which includes the applicant's height, weight, measurements, heart and lungs, a review of his nervous system and an abdominal examination. I made such an examination on or about March 4, 1932. As far as my examination of Walter E. Frey went, I found no evidence of disease. I found him to be in a normal condition of health and so reported to the defendant. On or about June 1, 1932, I again examined Walter E. Frey in a less extensive manner. I examined his heart and I found nothing abnormal that I could detect, which I reported to defendant.

Thereupon defendant's motion for dismissal was renewed and denied, and an exception allowed as to each policy separately.

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ADOLPHUS BERGER,

being called as a witness for defendant, being first duly sworn, testified as follows: [52]

I am a physician and surgeon, licensed by the State of California, and have been practicing my profession in San Francisco eight years. Part of

(Testimony of Adolphus Berger.)

that time I was attached to the Coroner's Office as Autopsy Surgeon, for a little over five years. I resigned the first of this year. I was autopsy surgeon in June, 1932, and as such had occasion to perform an autopsy upon the body of Walter E. Frey, on the 4th of June, 1932, at about seven o'clock in the morning. It was stated that he had gone to bed apparently in normal condition the night before and had died sometime during the night, and I examined the body of the one identified to me as Walter Frey at the funeral parlors of N. Bray & Co. on two occasions, first at seven o'clock in the morning, and again later the same day. I determined to my satisfaction the cause of death, which I recorded as acute dilation of the heart, chronic myocarditis, and coronary sclerosis with occlusion, the latter being the immediate cause. I was unable to find any indication of any other pathology, that is, any other disease; no evidence of any injury. I did detect the odor of alcohol from the stomach content, the content of which and the stomach I sent to the chemist attached to the Coroner's office for analysis. Subsequently I examined the same body and again carefully reviewed the condition of the heart, and I confirmed my former opinion as to the cause of death, and so signed the death certificate. I based that conclusion on the following factors in my examination: The finding of that defective pathology, that defective disease, which is not seen in normal health, and the elimina-

(Testimony of Adolphus Berger.)

tion of any other diseases or injuries of any kind. The heart, in itself, was acutely dilated. It was ballooned out in all of its chambers, [53] the heart being a four-chambered organ, filled with blood. The heart, in itself, was about one and one-half times its normal size, with scattered areas throughout of musculatory or fibrous replacement. That is the result of injury to the heart muscle at some previous time. The coronary vessels—those are the vessels which cut off the large artery in the body that supplies the heart muscle with blood, itself, I found to be thickened and hardened. That is termed sclerosis of those vessels. On the left side the immediate branch of the left coronary vessel I found to be completely shut off. That is a condition that cannot exist with life and not show any further damage to that particular portion of the heart. I saw no evidence by its closure that it had caused any acute or very immediate disease. I concluded that the individual had died so quickly that no acute disease as the result of this closure of that vessel could have formed. This I know, from my past experience in the examination of thousands of these types of heart, is a cause for immediate death. The occlusion is the cause for immediate death. I found that the heart was a chronic heart; by that I mean there had been pre-existent disease as distinguished from acute.

Mr. BOLAND: Can you tell us, Doctor, from your experience and your examination of the body,



(Testimony of Adolphus Berger.)

whether this disease could be detected by the ordinary medical examination which would ordinarily be made for insurance companies, or just an ordinary medical examination in your office?

A. In many, many instances that type of heart is entirely missed.

Q. How can it be discovered?

A. There are certain procedures, very technical, that we may go through with. To determine its [54] size, you may find that by X-ray. To determine this particular type of disease might be determined by other technical examinations—electrocardiogram, and various other pulse registrations which are highly technical and do not come into the ordinary course of an examination. I am familiar with the usual type of insurance medical examination. This disease could be very easily not detected by that type of examination. From my experience and the examination made, this disease existed on March 4, April 15 and June 1, and probably existed long prior to March 4. From my experience as a physician, and my examination of the body, Walter Frey was not in good health on April 15.

#### Upon Cross-Examination

the witness testified as follows:

At the time of this examination I was connected with the Coroner's Office in San Francisco. I did an autopsy to determine the cause of death. Asked if as a representative of the Coroner's Office he was not primarily interested in ascertaining whether or not death was occasioned through natural causes,

(Testimony of Adolphus Berger.)

he said he would not put it that way. It is my duty to find the cause of death. I made two examinations of the body. Between the time of my first examination and the time of my second examination, I did not have any conversation with any one representing the defendant. Prior to giving my testimony today, I spoke with Mr. Boland. The immediate cause of death is the chronic sclerosis with occlusion. I found acute dilatation of the heart. It is correct to say that by acute dilatation of the heart I mean that the heart muscle had relaxed so that the heart at the time of death had expanded and did not contract. It is not true that such dilatation and enlargement is found in the case of any heart that becomes acutely dilated at the time of death. It is not true that any heart that is acutely dilated at the time of death is enlarged. I can tell very closely by the size of the heart, as I find it relaxed after death, what the size of that heart was in normal life. I would not have to [55] weigh it. I think I can accurately determine that fact.

Q. Did you make any examination in this case, Doctor, to ascertain or that would enable you to ascertain the size of that heart which had, as you say, relaxed, and not contracted again at the time of death, what the size was in life?

A. Very close to the size in life. A heart that is acutely dilated, as this heart was, and which you have properly stated is not a dilation but a relaxation, when opened and allowed to empty itself of the contents of its chambers and then brought back to its position as it should normally be, is a very



(Testimony of Adolphus Berger.)

close consideration of what it was in life. Of course, if it is allowed to stand or lay baled with its clotted blood, we cannot very well tell. That is a routine part of the examination, to cut the heart in such a way that the entire inside of the heart is exposed, and that the entire free blood which is not part of some disease is eliminated from it. I certainly did that in this instance. I was able to ascertain whether or not this heart was in lifetime an enlarged heart. I said it was about one and one-half times the normal heart. I mean to say that if a heart is one and one-half times its normal size at the time of death, and three days before that man passes away that heart is examined by a doctor and he finds the heart to be normal size, it is my opinion that if a heart were enlarged to one and one-half times its normal size that would not be detectable upon examination. In many instances a skilled physician, such as I am, examining the heart of an individual whose heart is enlarged to one and one-half times its normal size, would be unable to detect that enlargement on examination.

Q. Doctor, you are giving us the exceptions. Do you mean to say in general any skilled physician would not be able to detect an outline the size of a heart that is one and one-half times its normal dimensions?

A. That is exactly what I mean to tell you, that he [56] would not in many, many instances.

Q. I am asking you if generally he would be able to ascertain that fact.

(Testimony of Adolphus Berger.)

Mr. BOLAND: I think the witness has answered that question.

A. I don't know what you mean by the word "generally," and I changed it to "many, many instances."

Mr. EISNER: Q. Are there not recognized methods of ascertaining the size of the heart?

A. I think there are.

Q. Can't the size of the heart be outlined?

A. Many times no.

Q. What prevents you in those many times is that they are exceptional times?

A. No.

Q. What would prevent you from outlining and determining the size of a heart on physical examination, giving it your skilled care and attention?

A. The shape of the chest, the position of the heart assumes in the chest, the degree of space between the most anterior surface of the heart and the chest wall, the amount of muscle, the amount of fat, possibly the amount of hair, the type of breathing of the individual while being examined, the position the individual assumes while being examined, and whether or not throughout the examination all these things are taken into consideration, because the change of position, the change of breathing, the change of conditions under which the patient is all will tend to blot out the possible accurate borders of the heart; and whether or not it is percussed so that the actual borders from both left and right sides are determined is questionable; it is questionable

(Testimony of Adolphus Berger.)

whether or not it is all accurately determined on the edges of the heart. I admit that I have missed it on many, many occasions.

Q. Doctor, what was there in your examination here that led you to determine that there was, as you say, a pre-existing condition? What was there about your findings that led you to believe that?

A. The size of the heart, the amount of fibrous replacement in the [57] heart muscle, which is not normal, and which is not acute; by that I mean does not come on within recent limits. The amount of thickening of the coronary vessels; the complete occlusion of the left one; the thickening of the cusps of the valve at the aorta, which is the biggest vessel that leads from the heart, all make it an undoubted chronic heart, a heart which had pathology in it of long duration.

Q. As I understand it, that occlusion that you found was one of recent occurrence: Is that true?

A. I feel that that was the cause of death. The conditions which brought about the occlusion was certainly not of recent origin. If you will pardon me, I have not finished my answer. I would like to finish it. I don't like to make an answer without qualifying it, for fear of being misunderstood. I had started to tell you that I was certain that the condition which brought about the occlusion of this particular vessel was of long duration. The immediate cause of death was the final occlusion; in other words, the vessel, being about the size of a soda straw, could gradually become thickened, and thick-

(Testimony of Adolphus Berger.)

ened so that the lumen of it were probably no larger than the ordinary pin. From that original size I described down to that small size is a long time ailment. The sudden final closure of what is left being acute, that being the final thing that shuts the blood supply off, that, in my opinion, in this particular instance, was the cause of death. It is not a fact that on a physical examination which occurred only four days prior to death there would ordinarily be indications discoverable. It is not true—quite the contrary—that if one had a sclerotic condition, as I described it, of any extended condition, that ordinarily the palpable vessels would also be sclerosed to a certain degree, so as to be determinable. Quite the contrary is ordinarily true. It is not a fact that if a man had a sclerotic or a myocarditic condition such as I found here, and to the extent I have indicated, that individual will suffer from a shortness of breath, [58] ordinarily. It is possibly but not probably true that he will suffer from certain pains. In my opinion, a man with a condition of heart, as I have found this, could have gone about his daily work perfectly happily, with normal exercise, and not be aware of his condition. I don't know what you mean by normal exercise, but I have on hundreds and hundreds of occasions autopsied individuals whose normal exercise it was to carry hod up a stepladder as hodcarriers, to work in the Union Iron Works as hard laborers, to be bricklayers, and to go along perfectly normally with this type of condition and suddenly drop dead without being in the midst

(Testimony of Adolphus Berger.)

of any of that labor—gone home to eat and dropped dead at the table after putting in eight hours work carrying the hod up a ladder, or working at the Union Iron Works. I have autopsied hundreds and hundreds of those types of cases. The only accurate way in which the existence of the diseased condition, as I have described it, could have been discovered, was by the performance of an autopsy. It is probably true that this sclerotic condition is gradually, you might say, degeneration of the vessels of the heart, which goes along with years, in the case of almost any normal individual, and that is why I told you that the coronary vessels with such sclerosis do not necessarily mean there is sclerosis in the palpable vessels; in fact, sclerosis of vessels, in most instances, has a particular affinity for certain vessels; there can be marked sclerosis of the coronary vessels, and the individual have perfectly soft palpable vessels elsewhere. There can be marked sclerosis of the vessels of the brain to such an extent that the person might die of an apoplexy at any moment, and you will find soft easily pliable vessels in the heart and elsewhere. It has an affinity for certain parts of the body. In many instances it is true that this sclerotic condition is not pathologically designated as a disease of the heart, but is a gradual, you might say, thickening or hardening of the [59] vessels of the heart, which comes along with years. It does not have to be true. We find 80-year-old individuals die who do not have thickening of those vessels, at all. They are just as soft as they would normally be in a young adult.



(Testimony of Adolphus Berger.)

Q. Is it not true that, pathologically speaking, sclerosis of the vessels is not a disease of the heart?

A. I said coronary sclerosis with occlusion; I said nothing about the heart muscles. That is the heart vessel.

Q. In other words, what you found was not, properly speaking a disease of the heart, but a degeneration, a hardening of the vessels.

A. That part of it. I also found a disease of the heart, chronic myocarditis. Chronic myocarditis is not a prevailing sclerotic condition of the vessels of the heart? You are wrong about that. That is a disease of the muscles of the heart. Myocarditis is inflammation of the myocardium, which is muscle of the heart. It has nothing to do with vessels.

Upon Redirect Examination,

the witness testified as follows:

I do not know anyone connected with defendant, except Mr. Boland. My recollection is that he was the first and only one I spoke with in connection with this case, other than those employed in our own office, and that was many months after this autopsy.

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HERBERT W. ALLEN,

being recalled as a witness for defendant, being first duly sworn, testified as follows:

I heard the testimony of Doctor Berger. In most instances the condition of the body of Walter Frey, which he described, would not be ascertainable by

(Testimony of Herbert W. Allen.)

me on the usual life insurance medical examination. There are special methods, special examinations of discovering that. These are not ordinarily used in the medical [60] examination for life insurance. If the condition had been disclosed to me, whether on my examination or otherwise, Walter Frey would not have been accepted for insurance by the defendant. He would not have been considered an insurable risk. With ordinary sclerosis, as described by Doctor Berger, Walter Frey would not be in good health on April 25, 1932.

Upon Cross-Examination,  
the witness testified as follows:

On my examination, about March 4, 1932, I did examine the palpable arteries. Palpable arteries are those that we feel in the wrist, in the bend of the elbow, on the temples, and in the neck.

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Defendant thereupon offered and there was received in evidence, declaration of Walter Frey made June 1, and marked "Defendant's Exhibit A." [61]







(Testimony of Herbert W. Allen.)

It is true, my examination of those palpable arteries was for the purpose of determining whether there was evidence of sclerosis or hardening. That is the method, so far as palpable evidence is discoverable, whether or not sclerosis exists in the peripheral arteries. I examined the heart, so far as I could, to ascertain whether it was an enlarged heart. There are definitely recognized methods and practices known to skilled physicians for the purpose of ascertaining whether or not a heart is normal in size.

Q. Is it not a fact that in the ordinary case, Doctor, if a heart is materially enlarged, that this fact is discoverable by a skilled physician?

A. There are many exceptions.

Q. I am not asking you for exceptions, Doctor, I am asking you if in the ordinary case if a heart is materially enlarged heart, that this fact is discoverable upon examination by a skilled physician.

A. Just what do you mean by the ordinary case?

Q. I mean in the great run and the great majority of cases.

A. No, I think you are wrong. [63]

Q. What do you think is a correct answer, Doctor, respecting that inquiry?

A. I would say no.

Q. Do I understand you correctly, then, that ordinarily a skilled physician cannot ascertain whether or not a man's heart is materially enlarged? Is that your answer to that question?

A. If he has access to all the possible methods he should, yes. I would say no to the question

(Testimony of Herbert W. Allen.)

whether in the ordinary case if a heart is materially enlarged, that fact is discoverable upon examination by a skilled physician. If a skilled physician has access to all the possible methods he can ascertain whether or not a man's heart is materially enlarged. Frey was submitted to me for an examination to find out whether or not he was a good risk from an insurance point of view, and one of the questions and inquiries for me to determine was whether or not he had a sound heart. It is not entirely true that I applied, so far as I knew, the methods of examination of skilled physicians for the purpose of ascertaining whether or not the man's heart was a normal organ. There are technical methods that Doctor Berger mentioned that are not used in the ordinary insurance examination. These methods are not applied unless we have some reason for applying them. I refer to possible events in the applicant's history which would excite a suspicion of possible trouble. The method by which I determine the size of the heart is to try and locate the apex beat, that is, the portion of the heart that impinges against the chest wall. We percuss the side of the heart, and listen with a stethoscope. I applied those three methods in this instance, and according to the examination made to the best of my ability I found Water Frey's heart to be normal. I listened to ascertain whether there were any murmurs, and found no evidence. I took his blood pressure. I don't recall what the figures were. If there was anything abnormal about it I would have [64] called it to the attention of the defend-

(Testimony of Herbert W. Allen.)

ant. It is certainly not true that in a case of any advanced arteriosclerosis or chronic myocarditis the patient would have given some physical symptoms of suffering from such disturbance. He would not be a sufferer from shortness of breath. It is not necessarily at all true that he would have difficulty in engaging in violent physical exercise. He absolutely would not have a symptom of swelling of the feet. It is true, in my opinion, an apparently normal healthy strong robust individual—apparently to all appearances—may engage in violent physical exercise, and it not be discovered until a postmortem examination that he had arteriosclerosis of the coronary vessels and myocarditis. It is not necessarily true, at all, that arteriosclerosis goes along with advancing years. There usually is, ordinarily as years advance, a gradual change in the arteries of the individual, a hardening. This gradual hardening of the arteries is called sclerosis. It is not at all a fact that this gradual hardening of the arteries is not designated a disease. It is a disease.

Q. So, in your opinion, everyone who has a hardening of the arteries gradually with advancing years is a sufferer from a disease of the heart: Is that true?

A. You are making a special case of advance in years.

Q. I am assuming a special case. I am assuming that one has arteriosclerosis in advancing years, is that man a sufferer from a disease of the heart?

A. He does not necessarily suffer from a disease



(Testimony of Herbert W. Allen.)

of the heart, no. I don't quite follow your question; it cannot be answered very accurately the way you put it.

Q. Is it not a fact that pathologically speaking, or from the standpoint of a disease, the hardening of arteries is not considered or classed as a disease?

A. I think it is classed as a disease quite definitely. I never met Doctor Berger. [65]

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A. M. MOODY,

being called as a witness for defendant, being first duly sworn, testified as follows:

I am a pathologist. I am a graduate in medicine and licensed to practice medicine and surgery in the State of California. I devote myself to the study of the disease processes, rather than to the treatment of patients. In other words, it is more of a scientific investigation than the mere treatment of diseases as it presents itself in patients. I am connected with the St. Francis Hospital, as a pathologist. I have made somewhat of a study of diseases and troubles of the heart and arteries. While pathologist at the Coroner's Office, I conducted quite a series of observations on coronary diseases and resulting changes in the heart. I heard the testimony of Doctor Berger and Doctor Allen, and I heard Doctor Berger's description of the condition of the body of Walter Frey as he discovered it upon autopsy. I should not consider a person in the con-



(Testimony of A. M. Moody.)

dition which he described to be in good health on the preceding April 5. He might be in apparent good health. I mean he might be in apparent good health, but not in actual good health. I agree with the testimony of the two doctors that it would be easy to miss it by an examining physician. In a way I am familiar with the ordinary type of insurance medical examination. I have never made any insurance examination, however. With my knowledge of that custom and practice, and the condition of this body, as it has been described, I think that condition could be overlooked by an insurance medical examiner. As a matter of fact, I have seen similar conditions many times that have been overlooked by competent medical men. I am not connected in any way with defendant, other than coming here to testify at your request. Other than Doctor Allen, I do not know anyone connected with it in San Francisco. I have spoken to Mr. Boland before my examination today, and he or his [66] representative asked me to come and testify.

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LESTER A. STEINFELD,

being called as a witness for defendant, being first duly sworn, testified as follows:

I am an agent for defendant. I solicit applications. I have nothing whatever to do with the issuance of policies. If a policy is issued, I endeavor immediately to get the premium. It is a rule of the company that no policy shall be delivered with-

(Testimony of Lester A. Steinfeld.)

out an inspection receipt, releasing the company from any liability in the event of death, before the check or the money is paid. The inspection receipt has to be delivered or the money paid. I knew Walter Frey for many years, in his lifetime. I took an application from him. It was signed in my presence.

Thereupon there was offered and introduced in evidence, the policy application, which was marked "Defendant's Exhibit B". It was signed on March 4th or 5th. (Here insert). [67]













(Testimony of Lester A. Steinfeld.)

The WITNESS: (Continuing) The purpose of the insurance was to replace higher priced insurance, and this was going to be a cheaper insurance and it would save the company considerable money. We sent on an application for \$35,000.00 payable to the San Francisco Milling Company and also some personal insurance payable to individuals.

The matter of aviation came up in this way: It was discussed. The matter was complicated by reason of the fact that Walter Frey contemplated making some aviation trips in a private plane that belonged to a foreman of his ranch. He told me that the company got this information and immediately refused to write the insurance on that ground. I don't know if that was the only ground, but they would not issue that insurance on account of that aviation intention of Mr. Frey. [70]

Thereupon there was offered and introduced in evidence, "Defendant's Exhibit C". (Here insert).

Thereupon there was offered and introduced in evidence, "Defendant's Exhibit D". (Here Insert).

Thereupon there was offered and introduced in evidence, "Defendant's Exhibit E". (Here insert).

Thereupon there was offered and introduced in evidence, "Defendant's Exhibit F". (Here insert).

Thereupon there was offered and introduced in evidence, "Defendant's Exhibit G". (Here insert).

The WITNESS (Continuing): Walter E. Frey did not want to sign any blank limiting any liability of the company, but finally we got him to sign that piece of paper (Defendant's Exhibit E) as the only means the company would have of issuing the

(Testimony of Lester A. Steinfeld.)

policy. Upon arrival of the two policies for \$10,000 each, payable to Selma Frey and Herbert E. Frey, I made a trip to the mill. There were present: Herbert Frey and Mrs. Steventon. I said, "Here you are, here are your policies." They looked at them, I said, "Here is a receipt from the company, I paid the money, I didn't take any chances that the company might recall the policies on me, I have taken it upon myself to pay the premiums, here they are." They looked at them. "The policies are now payable to the sister and the brother, and we are going to assign these policies over to the corporation as you want them." They looked at the assignments. It required four signatures on the assignments. They said, "Certainly you are a great big-hearted fellow to pay our life insurance premiums for us, thank you kindly,"—joking, in a way. We knew each other for a great many years—I mean I knew Herbert for a great many years. The matter went on in a kidding sort of fashion. Mrs. Steventon said, "We don't want these policies, Walter might be feeling good [71] some night and he will jump into a plane of a friend and fly on to Chicago and get killed." They said further, "It is impossible to comply with the requirements of these assignments, we couldn't in a thousand years get Walter's wife to sign those papers." I could see I was not getting anywhere, and was not making any progress, and no one seemed interested in the policies. Anyway, I left them there; they were paid for.

(Testimony of Lester A. Steinfeld.)

Thereupon there was introduced in evidence Defendant's Exhibit "H". (Here insert).

Thereupon there was introduced in evidence Defendant's Exhibit "I". (Here insert).

Thereupon there was offered and introduced in evidence, checks and a memorandum from the bank annexed, "Defendant's Exhibit K." (Here insert).

Referring to "Defendant's Exhibit K", those are checks that were paid to the company when I took the policies out of the company's office. They were handed to Mr. Murray, the cashier. That is my signature. I didn't get any money from the San Francisco Milling Company, or anybody down there, except a lot of good wishes. So I went back to the office and stopped payment on the check. I had written a letter to Mr. Frey—I think before I stopped payment—stating that I had paid the premiums on these two policies myself, they were then in force and I would like to have him favor me with a note. The policies all this time were down there. Quite a lot of time elapsed. I endeavored several times after that to get my money. I communicated many times with plaintiff or Walter Frey or Mrs. Steventon, principally with Herbert, he being the head of the firm and my personal friend. I talked to him about getting my money on the policies, that is, getting them to pay the money on the policies. They never paid it. I talked with Herbert Frey or [72] Mrs. Steventon. I endeavored to get those policies. One day I talked with Mrs. Steventon on the telephone. I told her I must have those policies, auditors are in town; I must have the

(Testimony of Lester A. Steinfeld.)

policies or money. The conversation over the telephone was that Mrs. Steventon received a request from me to send the policies into our company, that the auditor was there and we wanted those policies, and we must either have those policies or the money, and that the policies would be returned to them at any subsequent time they wanted if they complied with the requirements of the company. So she says, "I will send the policies up with Mr. Straight, an employee, and he will give you the policies in the Merchants Exchange Building." I said, "That's fine." I met Mr. Straight and took the policies away from him and turned them into the company. I would say that was probably a period of six weeks to two months subsequent to my original visit when they were given me to deliver. After that I did not have any talk with Walter Frey, or Herbert Frey, or Mrs. Steventon. I dropped the whole thing. I figured it was dead business, and that it was wasting time trying to do anything further. I heard from them again probably two or three weeks subsequent to that. Herbert rang me up and said, "Now, I know what we want to do, we know just what we want to do now, and how much we want to take." He told me how the policies should be made out and what they wanted to do. I said, "Fine, Herb, your instructions will be carried out, but we must have Walter call at our office and furnish us with another examination." He wanted \$5,000 for Jack Steventon, a nephew, \$5,000 to Herbert, and \$10,000 to the San Francisco Milling Company. I said, "All right, Herb, you will get them just the way you want

(Testimony of Lester A. Steinfeld.)

them, but Walter must furnish us a new medical examination." He said, "I don't see why." I said, "All right, you have to do it." He said, "Walter is out of town, he won't be here until next week, but when he comes back to [73] town I will have him go up and see Dr. Allen." I said "All right, fine." This was after I got the policies back. That thing was dead. Then they opened up again. I had given up all hopes entirely of ever doing any business down there. This was about three weeks after the policies were turned over to me. This was about May 15th. I went down to the mill again and said, "Now, Herb, let us have a little signing, you never signed anything yet, let us have a little signing now." He said, "My sister is out of town, I can't pay you any money." I said, "How are you going to settle for these policies?" He said, "I will pay one-third in cash and you can take the San Francisco Milling Company's note for two-thirds." I said "Fine, let me have the one-third cash." He said, "My sister is out of town, she is the cashier, she will not be back until next week, and I can't pay you until she is here." I said, "All right, sign here." I said, "As soon as your brother comes back send him up there and we will attend to the rest of it, and I also promise you, Herbert, that the day your brother comes up there I will personally see that the insurance is put in force. I will promise you that before sundown of that day." That was about May 15th. In due course Walter presented himself for examination and it was completed. The cashier notified me that Walter had furnished us what we call



(Testimony of Lester A. Steinfeld.)

a certificate of health. Policies 4165420 for \$5,000, payable to Herbert Frey; 4615421, \$5,000, payable to Steventon, and 4600870 for \$10,000, payable to Herbert Frey, were delivered to me by the cashier, on June 4. I immediately got on the telephone and talked to Herbert. I told him that the policies had arrived. He said, "I will meet you in an hour up in the Merchants Exchange." I said "Fine, where will I meet you—will I meet you in the grain pit?" He said, "No, I will meet you up in room so and so." I could not quite grasp that. Anyway I met him there in the office of Carl Schultz, an attorney. I met [74] Steventon. He came along with me. When we got there I said, "Here are your policies, boys." We were talking there for about five or ten minutes, and I said, "Is Walter dead?" They said, "Yes, he died last night." I had promised Herbert that I would pay the money for the premium into the company, but I didn't do it. I did make the promises.

#### Upon CROSS-EXAMINATION,

the witness testified as follows:

I have been in the insurance business since 1909 and have been doing business with the defendant about twenty years. I occasionally use the designation of City Manager of the Mutual Life Insurance Company of New York. There is not any such thing as city manager. The practice is down there of various titles being bestowed upon some of the boys. Some of them take "City superintendent", or "City manager". They don't mean anything



(Testimony of Lester A. Steinfeld.)

from the standpoint of compensation, if that is what you mean. I have probably been using the title of City Manager for ten years. I occasionally address communications under that title. I use the official letterhead of the defendant in writing under the title of City Manager. My office is with the offices of the defendant. I had known Walter and Herbert Frey for ten years. I solicited them for insurance. The deal was to take some less expensive insurance to replace insurance that was more costly. I knew that they were carrying \$55,000 on the life of Walter Frey and approximately a similar amount on the life of Herbert Frey. I endeavored to persuade them to let me write a cheaper insurance in my company. It is not an uncommon practice for an agent to put up some portion of the premium himself and take notes for the balance. If I ever said I would pay the first year's premium, it would certainly mean that I would never be big-hearted enough to put my hand down in my own pocket and pay the premiums without receiving some acknowledgment of indebtedness on their part. [75] I never did say I would pay the first year's premium and carry it for them if they would let me write the insurance. The understanding was always that if the insurance was placed in force by me it would be that I would be willing to pay the premium on that in part, and would take notes for the balance. My commission would amount to forty per cent of the first year's premium. On March 4, 1932, I had the application signed for \$55,000 insurance on the life of Walter

(Testimony of Lester A. Steinfeld.)

E. Frey, \$10,000 payable to Harbert Frey, \$10,000 to Selma Steventon, sister, and \$35,000 to the San Francisco Milling Company. I delivered the application to the cashier's office and asked Walter Frey to submit to a physical examination. He took it and passed. On or about the 8th of March, 1932, the company sent me two policies. A question arose because Walter Frey very frankly said that he wanted us to know that he intended to make an aviation flight with his superintendent in a private plane. I had Walter Frey retract this statement of his intention and write Defendant's Exhibit "E". That letter was written at my instance and partly at my dictation. I delivered the letter to the company. An aviation rider was annexed to the policies. The defendant refused to issue the \$35,000 policy to the San Francisco Milling Company, but I told Herbert Frey, Walter Frey and Selma Steventon that we could accomplish the same thing by having policies issued to individuals and assigned to the company. I gave the defendant my personal check for the premium on the two policies which are payable to Herbert E. Frey and Selma Steventon. I gave a check for the sixty per cent. I received a receipt in full. I brought the policies and the receipt to the San Francisco Milling Company and gave the policies and the fully paid receipt to Selma Steventon and Herbert Frey, the beneficiaries, with the words: "Here you are, here are your policies, here is a receipt from the company, I paid the money, I didn't take any [76] chances that the company might recall the policies on me, I have taken

(Testimony of Lester A. Steinfeld.)

it upon myself to pay the premiums, here they are.”

Plaintiff's Exhibit 5 is a memorandum in my own handwriting written out before I had the application signed. It reads: “Have Equitable Life Insurance policy and Travellers made over into two separate policies on each life. Herbert's policy to be cancelled and replaced with Mutual Life term insurance. Walter's policy to be taken over by Herbert Frey and Selma Steventon to replace Equitable Life Insurance Society's policies.”

I left the policies with Herbert Frey and Selma Steventon and left the receipt with them. I would say that I stopped payment on my checks too, three or four days after I delivered the policies. The check is dated April 11, and the notation from the bank is that it was returned unpaid April 14. Under date of April 16, two days later, I wrote and sent Plaintiff's Exhibit 6.

Plaintiff's Exhibit 6 was thereupon introduced in evidence and is as follows. (Here insert.)

I would say that I delivered the policies the preceding night. When I brought the policies out to Herbert Frey and Selma Steventon. I positively do not remember whether I did or did not ask them to sign any such paper as Exhibit J; but the chances are I called their attention to the fact. I have a recollection that I called their attention to them. If I didn't I would have lost my job. They were very immaterial, those papers. The most important was the checks. I handed them the policies folded up and in envelopes just as they were handed to me at the cashier's desk when I paid the premium.

(Testimony of Lester A. Steinfeld.)

Several weeks after the policies and the receipt had been in the possession of Herbert Frey and Selma Steventon I called up the San Francisco Milling Company and spoke to Mrs. Steventon. I [77] told her it was necessary to have the policies that day for the reason the auditor was in town and I wanted them for auditing purposes. I also told her it would be necessary to take the policies up or pay the money on them, that if she wanted the policies later on we would be able to return them to her at any time upon the requirements of the company being complied with. She sent the policies to me and I never returned them.

I was thereafter requested to have the second set of policies issued. For these Walter Frey required a second examination. I promised Herbert that before sundown of the very day Walter came up for this examination the insurance would be put in force. Walter came up for his second examination on the 1st day of June, 1932, and the second set of policies is dated the 1st day of June, 1932. The policies provide that the recurrent premiums are payable on the 1st day of June of each year. The term insurance expires on the 1st day of June, 1947. I should have gotten a note on June 1st for the premium.

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GERALD W. MURRAY,

being called as a witness for defendant, being first duly sworn, testified as follows:

(Testimony of Gerald W. Murray.)

I am agency cashier for defendant, in the San Francisco agency. I am in charge of the receipt and release of policies. The defendant is a mutual company. It has no stockholders. In other words, it belongs to the policyholders. Mr. Steinfeld is a soliciting agent. He has no authority whatever to make any contracts or agreements on behalf of defendant. His duties are merely the soliciting of applications and the turning in of the applications to my office.

The COURT: Q. You say he has no authority to do what? [78]

A. He has not any authority to bind the company, or make supplemental contracts.

I have seen Exhibit F and Exhibit D. They come from the Supervisor of Risks from our home office in New York. They come to me. Exhibit G is the same as Exhibits F and D. They come directly to my office from New York. Referring to Exhibit J, these yellow slips are copies of the original which are sent out in advance, in order that we may be posted on the action of the company in the particular cases. They are sent to my office. The policy then comes to my office, and is released to the agent. Slips like Exhibit J ordinarily accompany the policy, along with the original, but there are exceptions to that when they are sent out in advance. The agent has no authority to deliver a policy where there is a stoppage form like Exhibit J, which is given to him at the time the policies are given for delivery. The policy is given to the agent solely on condition that they will obtain



(Testimony of Gerald W. Murray.)

the proper signatures that are required, and acceptance, before delivering the policy. Originals of "Defendant's Exhibit J" accompanied the Frey policies when they were given to Mr. Steinfeld. I might also say that the other condition of delivery of the policy is that he shall collect the premium while the applicant is in good health.

The COURT: Just a moment, I don't think the jury understands the contents of Exhibit J, which was thereupon read:

"New Business.                      Stoppage Form.

"This advice does not modify or change any existing rules.

"To the Manager of the San Francisco Office:  
"From G. Trowbridge, Assistant Secretary and Registrar.

"March 9, 1932.

"The enclosed policy, No. \_\_\_\_\_, Insured's name Walter E. Frey, must not be delivered or the first premium accepted thereon until and unless the request [79] written below has been executed by the insured. This form when properly executed as above is to be returned to the Registrar's Division at the Home Office, G. Trowbridge, Assistant Secretary and Registrar, The Mutual Life Insurance Company of New York."

It is signed Mutual Life Insurance Company of New York with a blank for the date. Then it says:



(Testimony of Gerald W. Murray.)

“Referring to the above-numbered policies the undersigned hereby accepts the said policies issued as follows:”

With the correct name of the beneficiary as Selma Frey.

The foregoing was referred to in the testimony as “Exhibit J.”

Mr. BOLAND: That is the form which I understand was to be executed.

The COURT: That must be executed upon delivery of the policies.

Mr. BOLAND: Upon the delivery of the policies.

Q. And also the premium paid while the applicant is in good health? A. Yes.

The checks, Defendant’s Exhibit K, were turned in to my office. These checks were deposited in the bank and payment was stopped, and they were returned by the bank to my office.

Upon CROSS-EXAMINATION,  
the witness testified as follows:

I stated that defendant has no position of City Manager. I know that Mr. Steinfeld has been using the title of City Manager of defendant. I don’t know how long. It is not the practice of defendant to let the agents adopt titles. The company endeavors to discourage that. So far as we are able to control it, we do not permit it. He is an agent under contract with the company, and has his office with the company. The policies that came out with defendant’s Exhibit “F” were requested to be returned by the company [80] by letter dated in New

(Testimony of Gerald W. Murray.)

York, March 15, and received here on March 18. The policies were returned by me in compliance with the request. The yellow slips introduced as Defendant's Exhibit "J" have reference to the policies that were returned to the company. About April 8, 1932, new policies were sent out by the company accompanying Defendants' Exhibit "G". Those were the policies I turned over to Mr. Steinfeld after I received them in San Francisco.

When the company delivers policies to an agent, he is not personally charged with the premium, but it looks to the agent for the payment. The company has nothing to do with the collection of the initial premium. We look to the agent. The company holds him personally responsible. The second set of policies, dated June 1, 1932, were mailed to me from the New York office. They were mailed from New York in time to be received in San Francisco on June 4, 1932.

Upon REDIRECT EXAMINATION,  
the witness testified as follows:

Yellow slips were received accompanying the policies dated June 1st, the second set of policies. The original is to be signed by the insured and the policy cannot be delivered without that acceptance being signed. The policy is not in effect unless it is signed and the insured is in good health.

Exhibit L was introduced in evidence. (Here insert.)

Exhibit L was received in connection with the second set of policies.

(Testimony of Gerald W. Murray.)

The COURT: Q. That is in effect a receipt to be [81] signed by the insured?

A. It is an acceptance of the policy and the original is to be signed by the insured.

Mr. BOLAND: Q. And the policy cannot be delivered without that acceptance being signed, can it? A. No.

Upon RECROSS EXAMINATION,  
the witness testified as follows:

Mr. EISNER: Q. Do you mean to say that if the company receives its premium and retains its premium and the insured receives the policy and retains the policy that that policy is not in effect unless the insured has signed that yellow slip (referring to Exhibits J and L)?

A. Yes, and was in good health at the time the policy was delivered and the premium paid.

The COURT: I don't understand part of the witness' testimony.

I will explain that to your Honor. The situation was this: An application was signed on March 4; on March 8 or 9 two policies were sent out by the home office to San Francisco, one for \$10,000 payable to Selma Frey, and one for \$10,000 payable to Herbert Frey. Then the question arose regarding the aviation proclivities of Walter Frey.

Mr. BOLAND: And also the matter of the assignment.

Mr. EISNER: No, only the aviation proclivities of Walter Frey. When that question arose the company sent out this communication from the home

(Testimony of Gerald W. Murray.)

office, from its supervisor of risks, or whatever his designation is, asking for the return of these two policies which had been sent out on March 9th. In compliance with that the witness has testified he sent back those two policies. Then Mr. Steinfeld had Mr. Walter Frey sign a letter regarding aviation, which letter is in evidence, and which was [82] satisfactory to the company, that he would not fly in any but commercial planes, etc., for a period of two years, and they again sent out two policies.

Mr. EISNER: Q. Mr. Murray, on or about March 8 there were sent to you from the home office two policies of life insurance on the life of Walter E. Frey: Is that true? A. Yes.

Q. And those two policies were for \$10,000 each on the life of Walter E. Frey, payable to Selma Frey Steventon and to Herbert E. Frey.

A. Yes, and this memorandum states that the policies must not be delivered until released from the home office.

Q. And on March 15, that same month, you received another communication from your home office? A. Yes.

Q. And that communication constitutes a request to you to return those two policies? A. Yes.

Q. In compliance with that request which you received on March 15, 1932, did you return those two policies to the home office.

A. Yes, that would appear here, and there is nothing in the interim here to show that they were released.

Q. On April 8, 1932, the next month, did the company again send you two policies on the life

(Testimony of Gerald W. Murray.)

of Walter E. Frey, and again payable to Selma Frey Steventon for \$10,000 and to Herbert E. Frey for \$10,000.

A. Yes, it would seem that they apparently gave them the same numbers, omitting the one policy.

Q. Do you mean there were three policies that came first,

A. There were two policies came first.

Q. And two policies came again, A. Yes.

Q. In other words, Mr. Murray, after the company was satisfied regarding the aviation provision they again sent out the policies to you.

A. Yes, according to this. [83]

Q. And after you received these policies for the second time it was then that you received the check from Mr. Steinfeld and you turned the policies over to him?

A. Yes.

Mr. EISNER Does that clarify the matter, your Honor?

The COURT: Yes.

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BERNARD KAUFMAN,

being called as a witness for plaintiff, being first duly sworn, testified as follows:

I am a practicing physician in the City of San Francisco, having graduated from Cooper Medical College, in 1909, and took post-graduate work in the University of Chicago, in 1913, and in Europe, for seven years, in Vienna, Paris, London and Berlin. My specialty is diseases of the heart and vessels of



(Testimony of Bernard Kaufman.)

the heart, and am a cardiacalist and heart specialist for the Southern Pacific Hospital in San Francisco, and consultant for the Mount Zion Hospital and the French Hospital, and instructor in medicine at Stanford University. If an autopsy surgeon gave as the cause of death acute dilatation of the heart, chronic myocarditis, and coronary sclerosis, with occlusion, with no infarction present, I would infer the acute dilatation of the heart to be the result of death and not as the result of pre-existing disease; the chronic myocarditis to be the result of the coronary sclerosis. The cause of death would be the acute occlusion of the coronary vessels. With very rare exceptions, acute dilatation of the heart occurs in every death; that is to say, acute dilatation is one of the terminal conditions which occurs in the heart at the time of death. There are perhaps one or two conditions in which such a dilatation does not occur, such, for example, as in chronic bright's disease or in [84] a chronic condition of high blood pressure, the so-called essential condition, the nature of which we do not understand at present; in that case, also, the dilation of the heart is very minimal if it occurs; but with that exception acute dilation of the heart is a terminal condition that results at the time of death. By acute dilation of the heart I mean: Broadly speaking, there are three types of acute dilation of the heart. First of all, there is an acute dilation of the heart which can come about as the result of, for example, I could make your heart dilate actually without doing any harm at all to it, but so that it could be seen to



(Testimony of Bernard Kaufman.)

dilate under the fluoroscope, just by a simple maneuver, that is, have you hold your mouth closed, take a long deep breath, and at the same time try to expel that air out of your lungs, and at the same time closing your nostrils. That will clear up instantly. There is an acute dilation, which is normal in every individual at the time that individual undertakes any effort whatever; that is to say, the first thing that occurs in response to a demand for increased effort on the part of the body is an acute minimal dilation of the heart; it then restores itself to its normal size as previously. On the other hand, there is a condition known as a terminal stage in heart disease, in which there has been a preceding enlargement of the heart as the result of the heart's effort to overcome the diseased condition; the heart enlarges as the result of that effort to compensate for its inefficiency, it becomes larger; ultimately, when the capacity for enlarging the heart has reached its ultimate, then it dilates, and when dilation reaches its physiological maximum death occurs, and then there is a further dilation of the heart. In each case, as I [85] have described, the dilation would be discovered after death, the dilation without enlargement of the heart, that is, without hypertrophy of the heart, a pure dilation of the heart alone is a physiological episode of death. I might elaborate a little so that I can make myself clear. If a person dies, or if one does an autopsy and finds the heart in a dilated condition only, then the evidence is in favor of that dilation being a concomitant of death and not as the result of a pre-

(Testimony of Bernard Kaufman.)

existing heart disease. If, however, one finds at the autopsy evidences of hypertrophy and dilation, then one has the right to presume that there has been a preceding heart disease which has resulted in death, and then a final dilatation. Chronic myocarditis is in essence a misnomer; that is to say, it is a traditional term which has held up until today by reason of an unwillingness on the part of the profession to change it. As a matter of fact, the termination "itis" represents the Latin termination to indicate an inflammation of; for example, appendicitis, an inflammation of the appendix. Myocarditis does occur, that is, there are conditions in which a true myocarditis occurs. For example, in diphtheria, that is a true myocarditis. The term "myocarditis", as used by the profession in describing a heart condition in association with a hardening of the arteries of the heart is a term which has remained in use although recognized by the profession as not in any way evidencing a preceding inflammation of the heart muscle. There are suggestions on the part of a large number of men to change the term and to use a French term for it. That, however, has not found favor with the bulk of the profession. All the authorities who write on the subject use the term "myocarditis" with apologies. Coronary sclerosis is a condition, in the last [86] analysis, of hardening of the coronary arteries of the heart. The term "sclerosis" meaning "hardening of." There is a changed condition, a pathological condition which develops in the coronary arteries whereby the vessels which previously or at birth

(Testimony of Bernard Kaufman.)

are soft and pliable ultimately become, as the result of this degenerating process, hard and more or less brittle.

Q. If I told you, Doctor, that an autopsy surgeon found a heart acutely dilated in all chambers and filled with a dark fluid blood, the heart about one and one-half times its normal size, and there are scattered regions of fibrosis throughout; the coronary vessels of the left side indicate a marked thickening and in the descendens branch about one and one-half inches from its origin there is a complete occlusion by virtue of marked sclerosis of the vessel. There is no acute infarction seen. The coronary vessels of the right side, although thickened to a moderate degree, are in no way comparable to those of the left side. There is some sclerosis at the aortic cusps. The cusps are not flexible. Do these findings necessarily indicate that the person examined was not in good health prior to the time of death?

Mr. BOLAND: I object to the question as not comprehensive of the testimony of Doctor Berger. Doctor Berger indicated in his testimony that he had examined the heart during his autopsy and had excluded all the accumulated blood and came to the conclusion that the heart was one and one-half times its normal size for a long period prior to death, and anterior to the time when the application here was signed. Therefore, the question directed to the witness is not comprehensive, and therefore is objectionable. It does not state the testimony as given by Doctor Berger. [87]

(Testimony of Bernard Kaufman.)

The COURT: Objection overruled; exception.

A. No.

Q. They do not necessarily so indicate?

A. No.

Q. I will ask you if the findings such as I have read to you and indicated to you are ordinary changes in a heart and vessels found in autopsy upon individuals forty years of age, and over?

A. Yes; we can say that it is a rarity to find a person of forty years or over with coronary vessels that are intact. I think the figures given by Von Monkenberg are to the effect that at least 95 per cent. of persons over the age of 40 have coronary arterial hardening—sclerosis—and die of conditions other than due to coronary arterial occlusion or infarction. It is correct to say that such findings do not necessarily indicate that the person examined was not in good health prior to the time of death. According to my understanding, arteriosclerosis, or myocarditis, or both of these together, do not constitute a disease. As an actual fact, from the moment of birth until death there is a progressive deterioration and a series of progressive changes of degeneration which take place in all organs of the body, including the heart and the coronary vessels. From the age of six months on one can find in the arteries of an infant, even, evidence that sclerosis is beginning to occur. As a person lives long enough the sclerosis becomes more marked, until ultimately the sclerosis may develop to such an extent that at autopsy the coronary arteries cannot be cut with a knife, and have to be cut with a scissors, since they



(Testimony of Bernard Kaufman.)

are so markedly hardened—they are actually concrete pipes—lime pipes rather than concrete, they are pipes of lime; yet that person may function and the heart may function perfectly normally and allow them to carry on the normal every day occupation without any evidence of disease and yet at autopsy you find these changes. As a corollary of those changes in the coronary arteries you find corresponding changes which are termed—incorrectly [88] termed—myocarditis—also in proportion to the age of the individual and to the changes which have preceded in the coronary vessels. The extent of these changes vary in different individuals, and these changes are constantly going on in all individuals, and if an autopsy were performed, irrespective of the cause of death, there would be found to one degree or another a certain amount of what I term coronary sclerosis or myocarditis, with one exception so as to be accurate in the matter, there are isolated conditions or isolated cases, rather, in which there seems to be a predilection in the site in which these changes occur in the vessel; for example, in some cases the coronary vessels and the aorta may be relatively intact whereas the vessels of the brain may be markedly involved; or the vessels of the extremities may be markedly involved, or the superficial vessels may be markedly involved and yet the rest of the vessels of the body be only involved to a minor degree. Throughout the body changes of this character are constantly taking place to a greater or less degree throughout the whole of one's life. To the question whether it is possible

(Testimony of Bernard Kaufman.)

for an autopsy surgeon, finding an acutely dilated heart, to determine what was the size of that heart during life, my answer would be no. The reason for my answer is the following, that the size of the heart at autopsy is no criterion for enlargement or lack of enlargement because, in the first place, there is a dilatation that occurs at the time of death, which dilatation may be more or less, as I have previously explained, depending upon whether or not certain diseases are present or absent, and also depending upon if there has been any pre-existing heart disease. On the other hand, for example, in diphtheria, if one sees the heart of a person who [89] has died of diphtheria you only have to look at it to know that that patient died of diphtheria, by reason of the completeness and the magnitude of the dilatation; but that could not allow a person to say whether that heart during life was enlarged, because the criterion that is used to determine whether or not the heart is enlarged, that is, I mean the criterion at the autopsy table, you must use, in order to determine whether or not during the life of the deceased person the heart was enlarged, that is dependent wholly upon the weight of that heart. For example, the normal individual of average height and average weight would have a heart that weighed anywhere from 300 to 350 grams. Experience has proven that the ratio that the weight of the heart bears to the rest of the body shall be not more than .45 per cent. For example, if a heart weighed, say, 200 grams, that would be, under ordinary circumstances, with an ordinary sized man,



(Testimony of Bernard Kaufman.)

a small heart, but in a given case it may represent actual enlargement of that heart if the ratio that this 200 grams bears to the weight of the heart of the deceased is more than .45 of 1 per cent. On the other hand, a person may have a heart that at autopsy is found to weigh 400 grams. That is higher than the normal. Yet that heart may be a normal heart when taken in conjunction with the weight of the deceased, and be not more than .45 of 1 per cent. The criterion for enlargement of the heart is not given in the size of the heart at autopsy table measurements, but by the weight that the heart bears to the rest of the cadaver. To the question whether it is possible for an autopsy surgeon simply to squeeze the heart together, or to squeeze the blood that is in the heart out of it, and to determine from that that the man had a heart enlarged during his lifetime, my answer is I know of no authorities [90] that will allow that method of determining the size of a heart. It is reasonable to expect that if a patient has a materially enlarged heart, for example, one and one-half times normal size, that such a fact would be found by a physical examination, except there be a deformity of the chest wall of such a character that would make a physical examination not an average examination; for example, if the man instead of having the normal curvature of the chest—if he had the normal curvature of the chest then a heart which is one and one-half times the normal size could certainly be found by physical examination; otherwise physical examination would be useless if such a thing as that were not possible.

(Testimony of Bernard Kaufman.)

On the other hand, if the person in question had a chest with a deformity so that the normal contours of the chest were absent, then it would be very difficult to be certain that the heart was one and one-half times its normal size because the normal method would then be subjected to certain modifications which would tend to throw a person off their guard. Under ordinary circumstances, a heart one and one-half times its normal size is a big heart. If I were told that a patient was examined by a competent physician on March 4, 1932, and June 1, 1932, and found to have a normal sized heart, my opinion would be that it was normal. That opinion would not be changed by the findings of an autopsy surgeon after death, that the heart was one and one-half times normal size; because I have previously tried to explain to you that at death there is normally a dilatation of the heart as a concomitant of death, and therefore the enlargement of the heart that the autopsy surgeon found would, in the light of the two examinations by a competent physician previously, must therefore be interpreted as the normal dilatation [91] that has occurred in that individual's heart at the time of death. In my opinion, given the findings of the autopsy surgeon, the cause of death in that case would be acute coronary occlusion; and, unfortunately, I have seen it happen too often that a man in good health could suddenly die, and the same findings be disclosed on autopsy.

Mr. BOLAND: I object to the question as as-

(Testimony of Bernard Kaufman.)

suming certain things that are not in evidence, and other things that are contrary to the evidence.

The COURT: Objection overruled; exception.

A. Yes; I would go further even, if I might on that——

Mr. EISNER: Yes, you may make any explanation you wish.

A. If that heart at the time of physical examination were negative with respect to murmurs, then it is good presumptive evidence that the heart at the time of the examination was not dilated, because one of the most important signs of a dilated heart is the evidence of murmurs. If in this particular case no murmurs were found at the time of the two examinations, it would be presumptive evidence against the dilatation existing at those times.

Q. From the medical examiner's report in evidence in this case I find that upon the examination the pulse rate was found to be 80; is that a normal pulse rate for a man of 40 years of age?

A. At the time of examination for life insurance?

Q. Yes. A. Yes.

Q. I notice that the blood pressure systolic was about 145 and diastolic 85, and the pulse pressure 60; were these normal findings in a man 40 years of age?

A. At the time of the examination for the life insurance, yes. I add, "at the time of the life insurance examination," for the simple reason that there is always [92] an emotional factor, an apprehension and an anxiety at those times that a person might be rejected, and so there is a slight rise

(Testimony of Bernard Kaufman.)

in blood pressure, which life insurance companies and their insurance examiners neglect to take into consideration.

Mr. BOLAND: I move to strike out the latter part of the answer as assuming something not in the evidence.

The COURT: Motion denied; exception.

Upon CROSS-EXAMINATION,  
the witness testified as follows:

I was first consulted with reference to my testimony in this case at nine o'clock last night, and charging a fee for my services as expert. I discussed the case with Mr. Eisner, of course, and the only thing I know about the case is from my conversation with Mr. Eisner last night, and the questions which he has put to me today. That is all I know about it.

Q. I understood you to say that a baby from six months old onward has a gradually increasing chance of death?

A. From the moment of birth—not from six months.

Q. I don't think we have to look at a medical book for that. I believe it was placed in another famous book something like this: "In the midst of life we are in death." That is correct, is it not?

A. Yes.

Q. Of course I refer to the New Testament. That is all, Doctor. Thank you.

## L. A. STEINFELD,

being recalled as a witness for defendant, being first duly sworn, testified as follows:

I remember the conversation occurring after the policies were left at the mill, concerning the assignment and the aviation clause. There was quite a good deal of talk. This is the con- [93] versation that took place when I got down to the mill the first time with the policies for \$10,000 each and endeavored to get some settlement from the insured in connection with them,—either a note or a check for the premiums on those policies; that is what I went down there for. I presented the policies and was greeted with a reception something like this: “Why, you big-hearted fellow, paying life insurance premiums for us, we are certainly very much obliged to you, who told you to pay the premiums?”—and such remarks as that, kidding me along, because they knew me pretty well. This conversation was about an hour’s duration. I told you what Mrs. Steventon said in connection with the matter. Mrs. Steventon said: “Why, we would be taking a big chance here, Herbert, in taking these policies and cancelling other life insurance that has been in force and taking these policies where there is a clause in the policy, whereas we have an incontestible clause in our policies within two years”—Any life insurance clause is contestible within two years. Mrs. Steventon brought up the point that the new insurance was contestible, and they would be taking a big chance in surrendering old life insurance which had been in force for more than two years



(Testimony of L. A. Steinfeld.)

for one having this aviation clause in it. She remarked: "Walter is liable to be feeling good some night and get into a plane and fly with a friend of his to Chicago." I agreed with her. That was one source of objection why I could not deliver the policies and get my money. Another one was a requirement of the company, the policies being made out to beneficiaries, they were not interested in that, they were interested in corporation life insurance, and I could not get that for them, and in order to accomplish what they had in mind they would have to make the assignment. The assignment called for four signatures. They said, "Why, it's impossible to get Walter's wife to sign these papers, you know that." I could [94] see there was not very much chance of my doing any business that day. There were two very good reasons. That was the day I first made my appearance with the policies, in March.

The COURT: Q. That is the day you left them?

A. That is the day I left them. I left them there and left the receipt there. I took the receipt up a little later. I took that receipt away a couple of days later. I said, "Now, try and fight it out and come to some conclusion about it and see what you can do, the policies are in force, I will see you again."

Q. You had not paid the premium in March on those policies. What is the date of the checks?

A. April 11.

Q. That is when it happened, in April?

A. The checks are dated April 11.



(Testimony of L. A. Steinfeld.)

Q. But you did have a conversation with them in March?

A. That would all be previously.

Q. I want the date clear in my mind.

A. I took those policies down there on the date of those checks.

Q. Did you leave the policies there and then were they taken back to carry the aviation clause or rider?

A. No. When the policies were released to me and delivered to me by Murray, that aviation matter was all past and settled. That had been signed and delivered. The policies were passed to me. I paid the company the money. I immediately proceeded to the mill to get my money, which was the date of that check—in half an hour afterwards, say. I went immediately down there. It must have been in the afternoon, as I remember it.

Q. Did you try and get your money at any time before the 16th? You didn't get it on the day you delivered the policies, did you?

A. No. I made another attempt, and that is where the discrepancy in dates comes in, between the date of the letter and the date of [95] the check. Mr. Eisner brought that out as a discrepancy this morning. I must have gone down the next day, probably, to see Herbert again. I might have seen him at the Merchants Exchange. I don't know where it was. I probably went back at him the very next day to see if they came to any conclusion in connection with the matter.

(Testimony of L. A. Steinfeld.)

Q. You say "conclusion." You delivered the policies and paid the premium; you must have thought they were effective then.

A. Absolutely.

Q. You wanted to find out whether they had come to any conclusion as to the payment?

A. Yes, giving me my compensation. If I had died while that money was in the hands of the company I would have had no recourse against the San Francisco Milling Company, or my estate would not; I didn't have a scrap of paper from them. That is all I was after that day?

Q. What was the amount of those checks?

A. The checks I gave the company in connection with the Walter Frey policy was about \$186; I paid the company 60 per cent. of the net premium.

Q. Defendant's Exhibit I that has been referred to, that is a receipt you take from the insured?

A. No, it is not a receipt. We have a form of receipt, which was furnished by our company, where a policy is left for inspection only. That means where there has been no settlement. If you take out a million dollars worth of life insurance you would not get a receipt for the first premium, the policy is the receipt for the first premium; for every subsequent premium you get a regular company receipt.

Q. I mean a receipt for the policy.

A. Where a policy is left with an applicant and he has not made any settlement on that, the company wants to be protected. It is supposed then

(Testimony of L. A. Steinfeld.)

that that policy should be left with the applicant with the receipt signed, "I hereby receive this policy and it is understood that no obligation [96] is incurred by the company while this policy is in my possession until I pay the premium on same.

Q. That yellow slip is to that effect, is it?

A. No, it has nothing to do with that, at all. Inasmuch as I had already paid the premium to the company on these policies, I had no hesitancy in giving them the policies. There was not any receipt for elimination of liability on the part of the company. It is not a conditional receipt. That yellow slip is something which came up in the issuance of that policy, but does not appear in the application. Am I correct in that, Mr. Boland? That has nothing more to do with the receipt than I have to do with President Roosevelt. That piece of paper has nothing to do with it; that piece of paper there says there have been certain changes made in the issuance of that policy which are not verified by the photostatic copy of the application.

Mr. EISNER: That is not so at all, Mr. Steinfeld. That speaks for itself, however.

A. (Continuing) The Judge has it there.

The COURT: Q. You said these were left with the policies. A. Yes.

Q. Why?

A. I should have had those signed.

Q. For what reason?

A. For the reason, just as it states on the top,

(Testimony of L. A. Steinfeld.)

there, this insurance policy is not to be delivered until the papers are completed.

Q. Until what is completed?

A. The policies have not been delivered until that piece of paper you have in your hand is signed.

Q. This says: "The enclosed policy or policies in the name of Walter E. Frey must not be delivered or the first premium accepted thereon until and unless request written below has been executed by the insured." That is evidently an instruction to the agent, isn't it?

A. Yes, to the agent. [97]

Q. It also says: "This form when properly executed as above is to be returned to the registrar's division in the home office." It is signed "G. Trowbridge, Assistant Secretary and Registrar." So you should have gotten the signature of Walter Frey when you delivered the policies?

A. Yes.

Q. And if he had been there you probably would have done so?

A. I would have endeavored to.

Q. I just was wondering why you left these.

A. As a matter of fact, I should not have left the policies there. Why did I leave the policies there? They didn't pay me anything for them. I was just going to take a chance that over night, or within twenty-four or forty-eight hours, they would come to an agreement on the matter. If I had been not quite so lax in the matter I would have taken those policies away the day I went down there and then I think these people would have paid the money.

(Testimony of L. A. Steinfeld.)

Q. I didn't know but what there was some particular significance to be attached to the fact that you have these receipts.

A. It is simply part of the procedure of delivering the policy, that those papers are signed, if there are any to be signed in connection at the time the policy is delivered.

Q. It is an instruction to you as to what to do, and it is a signed receipt by the insured that he accepts the policies as issued?

A. As issued, yes.

Upon CROSS-EXAMINATION,  
the witness testified as follows:

The policies and the receipt were there for several weeks. The policies were receipt for the premium. The separate receipt that I got from the company was taken away. I think it was there for a couple of days. On April 16, 1932, I wrote a letter. I stated in that letter that the policies are in full force and effect, and that they had the policies fully paid, because I had paid for [98] them. Now, I am going to qualify that statement, too. They were paid for. That portion of the transaction which was not completed was the signing of that exhibit, whatever the number is. Whether that is a legal point, or whether the insurance is in force, I am not a lawyer and I cannot say. The yellow slip is an instruction to the agent.

Mr. EISNER: Q. Look at it and see if it is not addressed to the manager. Were you the manager of the company?



(Testimony of L. A. Steinfeld.)

A. No, I was not.

Q. Then it was not addressed to you, at all, it was addressed to the manager of the company, wasn't it?

A. That is correct; that is what it says there, yes.

Q. It says on this document: "The enclosed policy, No. so and so, insured's name Walter E. Frey, must not be delivered or the first premium accepted thereon until and unless the request below has been executed by the insured. As a matter of fact, the company, itself—the cashier of the company in San Francisco—accepted from you the first premium upon these policies without this being signed, did it not?"

A. It is perfectly customary. I will explain to you why. The agent sets forth with the policy, upon receipt of the policy from the cashier, for these purposes to be completed. It is perfectly optional with the agent to place the money on the counter and take a receipt for the money. The agent could pay the cashier the money on those policies. He can set out for San Jose, if he pleases, and endeavor to deliver them and get his money out of the insured. It is physically impossible for the agent to go to San Jose and get these signed first. That would be impossible.

Q. When you gave the insurance company the policies were paid, were they not,—the premium was paid?

A. I paid the money to [99] the company.



(Testimony of L. A. Steinfeld.)

The WITNESS (Continuing): When I brought those policies down to Mrs. Steventon she mentioned that as one of the dangers of accepting the new insurance, that she was giving up old insurance, and she said "Walter may some night get into a plane with a friend of his and fly to Chicago, or some place." It is correct I said a few moments ago that this matter of aviation had all been settled several weeks before when Walter had written that letter, and that rider had been placed on the policy. The aviation matter was not entirely in the background when I brought the policies there on April 15. There was apparently still a matter of controversy after this letter was written by Walter Frey. I will explain that to you if you would like to have me do it. The aviation matter that was in the background was the matter between the life insurance company and the applicant. That was all threshed out and worked out to the satisfaction of the life insurance company, and they were willing to issue the policy with the restriction the applicant was willing to make, and the applicant was willing to accept it with that restriction. When this aviation matter was opened up again was when I came down to get some money. It was opened up by the fact that when I came to deliver the policies and get a check or a note, or an acknowledgment of indebtedness, one of the reasons was this matter of aviation; the other reason for not giving me a note in settlement was the matter of the assignment. That is all I was down there for. I was down there to put

(Testimony of L. A. Steinfeld.)

myself in a better position than I was in. A check or a note would do it. A note was perfectly good from the San Francisco Milling Company.

Mr. EISNER: Q. You were not willing to take Mr. Frey's word, or Mrs. Steventon's word that the money would be paid to you, without having a note signed?

A. Would you do it? [100]

Q. Yes. And didn't you do it?

A. I did it for two or three days and then I stopped payment on the check. I was liable to have gone out of that door the next minute and been run over by an automobile, then what protection would I have? I would like to qualify that, Mr. Eisner, by one further statement, because apparently you have not the correct impression in this matter. When you say I made no attempt between the time I delivered the policies and the time I telephoned to Mrs. Steventon, that is not so. I was a very constant visitor down there, I spent a good deal of time down there. In fact, I think I wore out two or three pairs of shoes going down there, and all without avail. I was so disgusted with the matter that when the office instructed me to return those policies I didn't want to waste time going down there to get them, I asked Herbert to send them to me. I didn't see Mrs. Steventon every time I went down to the San Francisco Milling Company. I did not always talk in front of Mrs. Steventon, if that is what you mean. There was not any difficulty in seeing Mrs. Steventon. I could look at her as I passed the counter.

(Testimony of L. A. Steinfeld.)

Q. Did you ever say to her, "Give me back these policies, they are not in force, they are not in effect, they are not paid for"?

A. I told her that she had better, as a member of the family, urge the acceptance of those life insurance policies.

The COURT: Q. As a matter of fact, you stopped the payment on the check, so that the insurance company was without any money, wasn't it?

A. Yes.

Q. The premium had not been paid?

A. No.

Q. The policies were out for six or seven weeks?

A. Yes.

Q. Finally the company said to you, "Get those policies"?

A. Yes.

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SELMA STEVENTON,

being called as a witness for plaintiff, in rebuttal, being first duly sworn, testified as follows:

When Mr. Steinfeld brought in the policies, about April 15, and laid them on the desk and said, "Here are these policies, they are fully paid for, here is the receipt," nothing was said by [101] me to the effect that I did not want the policies because of the aviation clause; and nothing said to the effect, "We don't want these policies, Walter might go up in an aeroplane one of these nights and go East or some place and be killed and then we would be with-

(Testimony of Selma Steventon.)

out insurance." I never heard anything of that kind said by Herbert Frey. I was present. Nothing was said by me to the effect that I did not want the policies because the signature of Walter's wife would be required to the assignment. I never heard Herbert Frey say it. Nothing was said about not wanting to retain and keep the policies. When Mr. Steinfeld 'phoned me, about the 24th of May, he said nothing about wanting the policies or the money. From the time Mr. Steinfeld delivered the policies, they were kept in the safe. I never saw such yellow slips as defendant's Exhibit J. I was not asked to sign any such slips.

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HERBERT FREY,

being called as a witness for plaintiff, in rebuttal, being first duly sworn, testified as follows:

I did not tell Mr. Steinfeld when he delivered the policies, about April 15, 1932, that I did not want the policies. I did not hear Mrs. Steventon say, "We don't want these policies, because Walter may take an aviation trip and be killed." I was never asked to sign such yellow slips as defendant's Exhibit J, and did not see any such slips.

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The testimony being closed, defendant moved the court for a directed verdict in favor of the defendant as to each policy upon each of the following grounds, and the court assented that defendant

should not be required to repeat the grounds as to each [102] policy as follows:

“That the preponderance of the evidence does not establish that there was any delivery of any policy with intent to consummate a contract of insurance. That the preponderance of the evidence does not establish, in fact, there is no evidence to establish, that there was any delivery of the policy to the insured, Walter E. Frey; in fact, the evidence discloses that he never, so far as the evidence shows, had his hands on the policy or ever knew that it had been left on the table, as testified, and he was the only party to this contract; Mrs. Steventon and Mr. Herbert Frey, etc., are not parties to the contract at all; the only contract was between Walter Frey and the defendant insurance company. There was no acceptance of any policy by Walter E. Frey, no premium was paid upon any policy by Walter E. Frey, or by anyone on his behalf, or otherwise. No policy was delivered to Frey, either by manual transmission or with intent to consummate a contract, which is the legal significance of delivery, while he was in good health. No policy was accepted by Walter E. Frey while he was in good health, and no premium on any policy was paid by Walter E. Frey, or by anyone on his behalf while he continued in good health. No policy was ever delivered to Walter E. Frey, or accepted by Walter E. Frey, or premium paid by Walter E. Frey while he was in good health.”

The foregoing motion was denied and an exception allowed.



Thereupon defendant moved that the court, in submitting the case to the jury, direct the jury to bring in a special verdict in connection with the general verdict, as to the various policies, as follows: (Here insert).

Thereupon the court instructed the jury, as follows: [103]

“It now becomes the duty of the Court to instruct the jury on the law in this case, and it becomes the duty of the jury to apply the law thus given to them to the facts before them. The jury are the sole judges of the facts.

“It is the duty of the jury to give uniform consideration to all of the instructions herein given, to consider the whole and every part thereof together, and to accept such instructions as a correct statement of the law involved therein.

“There are five policies of life insurance sued upon in this action. All of these policies are upon the life of Walter E. Frey. Two of the policies for \$10,000.00 each were dated March 8, 1932, and three others; one for \$10,000.00 and two for \$5,000.00 each were dated June 1, 1932. The fact of the death of Walter E. Frey is admitted. Presentation of proof of death was waived by the repudiation by defendant of any liability under the policies. The only question presented for your consideration is whether the policies, or any of them, ever went into effect. If you find that any policy or policies did go into effect your verdict should be in favor of the plaintiff on any such policy or policies.

“You must, in your deliberations, and in consid-



ering the evidence, and in arriving at your verdict, consider each policy separately. That is to say, you must consider separately as to each policy whether it was delivered, whether it was accepted, and also whether it was delivered and accepted and the premium paid thereon while Walter E. Frey continued in good health.

“As to each of the five policies, before you can find a verdict for the plaintiff you must be satisfied and find, by [104] a preponderance of the evidence, that the particular policy was delivered to and received by the insured or the beneficiary, and also that the first premium was paid during the insured’s continuance in good health.

“I call your attention to the fact that each and every one of the policies in this case contains an acknowledgment of the receipt of the first premium. Such acknowledgment is conclusive evidence of the payment of the premium for the purpose of making the policy binding. Section 2598 of the Civil Code of the State of California reads as follows: ‘An acknowledgment in a policy of the receipt of premium is conclusive evidence of its payment, so far as to make the policy binding, notwithstanding any stipulation therein that it shall not be binding until the premium is actually paid.’

“The Court instructs you that a policy of insurance will, in the absence of evidence to the contrary, be presumed to take effect upon its date.

“You are instructed that in order to constitute a contract, a policy of life insurance to be enforceable or valid must be delivered to and accepted by the insured or beneficiary with the intent that it shall

take effect as a contract. Delivery under any other circumstances does not bind either party. Therefore, if you find in this case that any of the policies of insurance was not so delivered or accepted, then, as to that policy your verdict must be for the defendant.

“The question of delivery is one of intent. Mere manual transmission of a document such as an insurance policy is not sufficient to make it effective. It must be accompanied with the intent of both the given and the taker that it shall be [105] effective as a delivery; and such intent is a necessary and vital element.

“The Court instructs you that delivery of a policy of insurance is effective by sending the policy to an agent of the company for the sole purpose of making delivery to the insured or the beneficiary.

“If it be intended that a policy of insurance should be in force before it is actually handed over, it will be deemed constructively delivered.

“If you find that certain policies were executed and mailed from the home office of the insurance company on June 1st and if you further find that it was the intention of the parties that they should go into effect on that date, then you would be warranted in finding that the policies were delivered on June 1st.

“The Court instructs you that possession of a policy of insurance by the beneficiary is prima facie evidence of its delivery as a valid and existing contract. The plaintiff in this action by producing and putting in evidence the three policies dated the first day of June, 1932, established a prima facie case to

recover upon said policies and the burden of overcoming said prima facie case thereupon shifted to the defendant insurance company.

“Prima facie evidence is sufficient in law to establish the fact, unless rebutted. For example, the mailing of a letter duly stamped and addressed is prima facie evidence of its receipt by the person to whom it is addressed.

Under the provisions of these policies which are before you, with respect to the condition that none of them shall be effective until and unless the policies respectively be delivered and the premiums paid during the continuance in sound health of [106] Walter E. Frey, you are instructed that such provision is a condition precedent to the taking effect of the policy. The effect of these provisions is to make it a condition that the policy shall not take effect or become valid and binding unless the insured was in fact in sound health at the time the policies were delivered (if you find they were delivered). In this aspect the defendant's objection is not made to depend upon fraud or misrepresentation, but upon the fact as to whether or not the applicant's health was good or otherwise. The inquiry then becomes an inquiry as to that fact, and does not depend upon the applicant's knowledge or belief. In other words, it is not claimed that the deceased or his beneficiaries were guilty of any fraud or misrepresentation. The question in this connection for you to decide is whether the deceased was in good health at the time of the delivery of the policies. He was not in good health on June 4th when the last of these policies were actually deliv-

ered, for at that time he was dead. Was it the intention of the parties that the policies should be deemed delivered when they were executed and mailed in New York June 1st and was the deceased in good health at that time.

“If you find that the first two policies for \$10,000 to Selma Steventon and \$10,000 to Herbert E. Frey were delivered to these individuals on or about the 15th day of April, 1932, and that they went into effect at that time, you should consider the question of whether these policies were understood by the parties to be rescinded and cancelled, or whether they were intended to remain in effect. No premiums had been paid on them by the insured or his beneficiaries in spite of request for payment. Assuming that the physical re-possession of the policies was obtained by the insurance company by subterfuge, nevertheless, if [107] it was acquiesced in by the insured and his beneficiaries with the understanding that the policies were cancelled, there should be no recovery on the policies. I may say that I have personally reached no conclusion on the question but I feel that it is my duty to call your attention to it. You should determine whether or not it was the intention of the parties to carry \$20,000 or \$40,000 in behalf of personal beneficiaries. You will recall that there was but one application and it was for \$55,000, \$35,000 of which was in behalf of the business and \$20,000 in behalf of personal beneficiaries. Only the \$20,000 was allowed. Later, six or seven weeks after the delivery of the first policies a

new physical examination was required before the policies dated June 1st were issued. It is for you to say in the light of all the facts and circumstances whether the three policies of June 1st for \$20,000 were intended to be in place of the original two policies aggregating the same amount, or were intended to be in addition to them.

“Walter E. Frey further stipulated in his written application that it is agreed that ‘no agent or other person, except the president, vice-president, a second vice-president, or a secretary of the company (that is, defendant) has power on behalf of the company to bind the company by making any promise respecting benefits under any policy issued hereunder, or accepting any representations or information not contained in the application, or to make, modify or discharge any contract of insurance, or to extend the time for payment of a premium, or to waive any lapse or forfeiture of any of the company’s rights or requirements.’

“You are further instructed that this stipulation was and is binding upon Walter E. Frey, and everyone acting for him [108] or on his behalf, and binding upon the plaintiff in this action.

“In civil cases, the affirmative of the issue must be proved. The affirmative here is upon the plaintiff. Upon plaintiff, therefore, rests the burden of proving all the material allegations of his complaint.

“Preponderance of evidence does not mean the greater number of witnesses, but the greater weight of evidence. Evidence is satisfactory which ordi-



narily produces moral certainty or conviction in an unprejudiced mind. Such evidence alone will justify a verdict. It is not necessary that your minds be free from all doubt.

“If the evidence is contradictory, your decision must be in accordance with the preponderance thereof. It is your duty, however, if possible, to reconcile such contradictions so as to make the evidence reveal the truth. When the evidence, in your judgment, is so equally balanced in weight and quality, effect and value, that the scales of proof hang even, your verdict should be against the party upon whom rests the burden of proof.

“In determining the credibility of witnesses you must consider, among other tests which may suggest themselves to you, whether his testimony is, in itself, contradictory, whether it has been contradicted by other credible witnesses, whether his statements are reasonable or unreasonable, whether they are consistent with the facts established by other evidence, or admitted facts in the case. You may consider the witness; manner of testifying on his examination, the character of his testimony, his interest or absence of interest in the suit, his recollection, whether good or bad, clear or indistinct, concerning the facts to which he testifies, his inclinations or motives, together with [109] his opportunity for knowing of the facts whereof he speaks.

“Of course, it goes without saying that you should not consider that some of the parties are individuals and the other a corporation. We have one law for all. Every one is entitled to exact justice.



“Forms of verdict will be given to you which will be helpful, and which will be self-explanatory. The verdict in federal court, unlike that in a state court, must be unanimous. Your first duty is to select a foreman, who will alone sign the verdict.”

Thereupon defendant objected to the refusal of the court to give the instructions requested by it, as follows, to each of which an exception was allowed:

“In this connection, you are further instructed that the law indulges in the presumption, from the fact that the policy is in the hands of the defendant insurance company, that it was never delivered with the intent that it take effect; and therefore the burden is upon the plaintiff to establish the contrary by a preponderance of the evidence, including the presumption.

“Assuming that you find that delivery was complete, that is, that it was not only manual transmission, also an intent that delivery be effective, then you are further instructed that such delivery may be rescinded; that is, the parties may agree that such delivery shall be of no effect.

“Such rescission of delivery may be established either by parol, that is to say, by verbal agreement between the parties, and not necessarily in writing, or it may be inferred from the conduct of the parties. [110]

“On the 4th day of March, 1932, Walter E. Frey made written application of defendant for three policies of insurance upon his life, one for \$35,000.00, payable to San Francisco Milling Co.; one

for \$10,000, payable to Herbert E. Frey, his brother, and one for \$10,000.00, payable to Selma Frey Steventon. This action does not involve any policy for \$35,000.00, nor is it claimed that any such policy was issued or delivered. In said written application said Walter E. Frey stipulated that 'the proposed policies shall not take effect unless and until delivered to and received by the insured or beneficiary, during the insured's continuance in good health, and unless and until the first premium shall have been paid, during the insured's continuance in good health.' Therefore, as to each policy, before you can find a verdict for the plaintiff, you must be satisfied and find, by a preponderance of the evidence, that the particular policy was delivered to and received by the insured (by which is meant Walter E. Frey) or the beneficiary, during the insured's continuance in good health, and also that the first premium was paid during the insured's continuance in good health; that is to say, you must find as to each policy both that the policy was delivered and also that the premium was paid thereon during the insured's (by which is meant Walter E. Frey) continuance in good health. It is not sufficient to find alone either that the policy was delivered or that the premium was paid while the insured was in good health, but as to each policy you must find, from a preponderance of the evidence, both that the particular policy was delivered and was accepted, and that the premium thereon was paid while Walter E. Frey continued in good health.

“Under the provisions of these policies which are

before [111] you, with respect to the condition that none of them shall be effective until and unless the policies respectively be delivered and the premiums paid during the continuance in sound health of Walter E. Frey, you are instructed that such provision is a condition precedent to the taking effect of the policy. The effect of these provisions is to make it a condition that the policy shall not take effect or become valid and binding unless the insured was in fact in sound health at the time the policies were delivered (if you find they were delivered). In this aspect the defendant's obligation is not made to depend upon fraud or misrepresentation, but upon the fact as to whether or not the applicant's health was good or otherwise. The inquiry then becomes an inquiry as to that fact, and does not depend upon the applicant's knowledge or belief.

“You must not become confused between the question of delivery as such and delivery in sound health. In legal contemplation, the two are quite distinct. I have already instructed you with respect to delivery as such; that is, that it must be accompanied with the intent that delivery be effective. I have also instructed you with respect to delivery in sound health. Therefore, if you should find that there was a delivery with intent that it be effective, under the instructions I have already given you, you must, before you can find a verdict for the plaintiff as to any policy, also find that such delivery with intent to make it effective took place,

and that the premiums were paid thereon while Walter E. Frey was in sound health. And you are further instructed that if you find that either of these is untrue, that is, that there was no delivery with the [112] intent that the same be effective or that such delivery did not take place while Walter E. Frey was in sound health, then your verdict must be for the defendant as to the particular policy under consideration.”

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Thereupon the defendant objected to the instructions given by the Court as follows, and as to each of which an exception was allowed:

“The Court instructs you that a policy of insurance will, in the absence of evidence to the contrary, be presumed to take effect upon its date.

“The Court instructs you that delivery of a policy of insurance is effective by sending the policy to an agent of the company for the sole purpose of making delivery to the insured or the beneficiary.

“If it be intended that a policy of insurance should be in force before it is actually handed over, it will be deemed constructively delivered.

“If you find that certain policies were executed and mailed from the home office of the insurance company on June 1st and if you further find that it was the intention of the parties that they should go into effect on that date, then you would be warranted in finding that the policies were delivered on June 1st.

“The Court instructs you that possession of a policy of insurance by the beneficiary is prima facie evidence of its delivery as a valid and existing contract. The plaintiff in this action by producing and putting in evidence the three policies dated the first day of June, 1932, established a prima facie case to recover upon said policies and the burden of over- [113] coming said prima facie case thereupon shifted to the defendant insurance company.

“Was it the intention of the parties that the policies should be deemed delivered when they were executed and mailed in New York June 1st and was the deceased in good health at that time.”

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After the jury retired the following occurred:

The COURT: The following note was sent from the Jury to the Court:

“Hon. Judge Kerrigan

“We the Jury in this case request additional instruction having to do with exhibit ‘J’.

“We desire, your Honor, to know if it was essential that these forms be signed by the applicant on delivery of the policies in order to complete the contract. This refers to the first two policies of \$10,000 each #4591472 #4591473.”

“Gentlemen: My answer is No.

“Frank H. Kerrigan, U. S. Dist. Judge.”

Mr. BOLAND: The defendant notes an exception to that.



(The following instruction was also sent to the Jury in connection with the above note:)

“Under the provisions of these policies which are before you, with respect to the condition that none of them shall be effective until and unless the policies respectively be delivered and the premiums paid during the continuance in sound health of Walter E. Frey, you are instructed that the burden of proof is upon the plaintiff; that is to say, the plaintiff must establish to your satisfaction, by a preponderance of the evidence, that [114] at the time of the delivery of the policies, respectively, if you find they were delivered, and the payment of the premium thereon, if you find that the premium was ever paid, that Walter E. Frey continued in good health.”

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Thereafter the Jury brought in the following verdict:

“We the Jury in the above-entitled cause find a verdict in favor of the plaintiff and against the defendant, and assess the damages in the sum of \$20,000 on account of policies 4591472-3. We the Jury find in favor of the defendant as to policies 4615420, 4615421 and 4600870.”

Thereupon an exception was allowed to the verdict of the Jury and to the entry of the judgment.

Thereafter plaintiff caused to be served upon defendant a notice of motion, as follows:

“NOTICE OF MOTION TO AMEND  
JUDGMENT

“To defendant above-named and to Messrs.  
Knight, Boland and Riordan, its attorneys:

“You, and each of you, will please take notice, and you are hereby notified, that on Monday, the 5th day of June, 1933, at 10:00 A. M., or as soon thereafter as counsel can be heard, in the courtroom of the above-entitled Court, plaintiff will move the Court to amend the judgment herein to provide for the recovery by plaintiff of interest at the rate of 7% per annum on \$20,000.00 from the 13th day of June, 1932, in addition to the principal sum of \$20,000.00 and costs.

Dated: May 29, 1933.

“NORMAN A. EISNER

Attorneys for Plaintiff.” [115]

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“CARL R. SCHULZ

Thereafter, and pursuant to said notice, and on the day therein mentioned, plaintiff moved the court for an order to amend the judgment herein to provide for the recovery by plaintiff of interest at the rate of 7% per annum on \$20,000.00 from the 13th day of June, 1932, in addition to the principal sum of \$20,000.00 and costs. And the court thereupon granted said motion.

The defendant on the 26th day of June, 1933,

moved the said Court to amend the said verdict and judgment by setting off and crediting thereon the amount of the first year's premium upon the two policies upon which the jury had found in favor of the plaintiff, and the Court did grant the said motion. The following written order was made and entered on the 28th day of June, 1933, amending the said verdict and judgment pursuant to the motion of both plaintiff and defendant:

“The motion of plaintiff to amend the verdict and judgment herein by adding thereto interest at the rate of 7% per annum from June 13, 1932, until May 22, 1933, and the motion of defendant that there be credited upon the amount of said verdict and judgment the sum of \$304.40 on account of the unpaid premiums on said policies having come on for hearing, it is

“ORDERED ADJUDGED AND DECREED that said verdict and judgment be amended and modified as follows: that there be credited upon the amount of said judgment, to-wit: \$20,000, the sum of \$304.40 and that there be added to said judgment so modified and amended, to-wit: \$19,965.60, interest thereon at the rate of 7% per annum from the 13th day of June, 1932, until the 22nd day of May, 1933, said order to be entered nunc pro tunc as of May 22, 1933.

“Dated: June 28, 1933.

“FRANK H. KERRIGAN,  
Judge of the United States District Court.” [116]

On the said 28th day of June, 1933, the Clerk of said Court did enter upon said judgment the amendment and modification thereof in the following words:

“Pursuant to an order signed and filed on June 28, 1933, the within judgment is amended, modified and reduced to the sum of \$20,993.87, instead of \$21,318.33.

“WALTER B. MALING, Clerk.”

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It is stipulated that the foregoing Bill of Exceptions is true and correct in all respects, that it was proposed within the time allowed by law, that amendments thereto were submitted within the time allowed by law, and that it was settled and allowed within the term of court in which the judgment was entered as extended.

NORMAN A. EISNER

CARL R. SCHULZ

Attorneys for Plaintiff.

F. ELDRED BOLAND

KNIGHT BOLAND & RIORDAN

Attorneys for Defendant.

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The defendant having filed its proposed Bill of Exceptions within the time allowed by law, and the plaintiff having submitted his amendments thereto within the time allowed [117] by law, and said Bill

of Exceptions having been examined and found correct in all particulars, and counsel for the respective parties having stipulated thereto, said Bill of Exceptions is hereby settled and allowed within the term of court in which the judgment was entered as extended.

Dated September 12 1933.

FRANK H. KERRIGAN

Judge of the United States District Court.

Due service and receipt of a copy of the within Bill of Exceptions is hereby admitted this 11 day of Sept. 1933.

NORMAN A. EISNER

CARL R. SCHULZ

Attorneys for Plaintiff

[Endorsed]: Filed Sep 12 1933

[118]

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[Title of Court and Cause.]

### PETITION FOR APPEAL

The Mutual Life Insurance Company of New York, a corporation, defendant in the above entitled action, feeling itself aggrieved by a portion of the verdict and judgment therein reading as follows:

“We, the jury in the above entitled cause, find a verdict in favor of plaintiff and against defendant and assess the damages in the sum of \$20,000.00 on account of policies No. 4591472-3”;

and the judgment on said part of said verdict was entered as of the 22nd day of May, 1933, wherein



a verdict was found for plaintiff in the sum of \$20,000.00, which verdict and judgment therein was subsequently amended by order of the court on June 6, 1933 wherein said verdict and judgment therein was amended to read as follows: "\$19,695.60 with interest thereon at the rate of seven per cent per annum from June 13, 1932 until May 22, 1933." Defendant herein further feeling itself aggrieved for that in and by said verdict and judgment thereon and the amendment thereto, and for that in the trial of the above entitled action certain errors were committed to the prejudice [119] of defendant, all of which will more in detail appear from the assignments of error which defendant has filed with this petition;

NOW, THEREFORE, comes F. Eldred Boland, Esq., attorney for defendant, and petition the above entitled court for its order allowing said defendant to prosecute an appeal to the Honorable Circuit Court of Appeals of the United States of America, for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided; and, also, that an order be made fixing the amount of bond and/or security, for costs, which said defendant shall furnish upon said order allowing appeal; and that, also, a transcript of the records and proceedings in this action, duly authenticated, may be sent to said Circuit Court of Appeals; and for such further relief as may be meet in the premises.

F. ELDRED BOLAND

Attorneys for Defendant.

Due service and receipt of a copy of the within .....is hereby admitted this 12th day of September, 1933.

NORMAN A. EISNER

CARL R. SCHULZ

Attorneys for Plaintiff.

[Endorsed]: Filed Sep 12 1933

[120]

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[Title of Court and Cause.]

### ASSIGNMENTS OF ERROR.

Comes now defendant, The Mutual Life Insurance Company of New York, a corporation, and in connection with and as a part of its appeal, makes the following assignments of error, which it avers were committed during the trial of the above entitled action and in entering the verdict and judgment therein against this defendant and in favor of the plaintiff; that defendant will rely on the following assignments of error in the prosecution of the appeal herewith petitioned for in the said cause.

#### I

The court erred in admitting evidence on behalf of the plaintiff as follows:

Plaintiff offered in evidence policy No. 4,615,421, policy No. 4,600,870 and policy No. 4,615,420.

MR. BOLAND: I object to the offer and introduction in evidence upon the grounds, first, that it does not appear that the policies are in conformity with the application which is printed therein. Second: There is no showing that the

premium thereon was paid. Third: It does not appear that any of the policies were delivered. Fourth: Upon the [121] ground that the premium thereon was not paid while the insured was in good health, and that the burden of proof is upon the plaintiff to establish that delivery occurred while the applicant was in good health. Fifth: That the premium was not paid while the application was in good health.

The objection was overruled and exception allowed, and the policies introduced in evidence, and copies of each were annexed to and are a part of the complaint herein.

## II

The court erred in admitting evidence on behalf of the plaintiff as follows:

Plaintiff thereupon offered in evidence copies of policies numbers 4,591,472 and 4,591,473, following stipulation of counsel that they were copies of policies dated March 8, 1932, and were furnished by defendant to plaintiff pursuant to an order of this court, that the originals had been destroyed, that the copies of the applications annexed thereto were annexed in error and that the true applications were the same as annexed to the other policies exhibits 1 and 2; that the marks "cancelled" appearing upon the signatures were not upon the originals at the time the policies were in the hands of plaintiff, and that the beneficiary as shown on the original of exhibit 3 was Thelma Frey.

THE COURT: (referring to exhibits 3 and 4) We will consider them as copies of the originals.

MR. BOLAND: As to these, I will make the same [122] objection, if I may do it in that manner, without repeating the grounds of objection.

THE COURT: Yes, you may, of course.

MR. BOLAND: And I add to the objection that these are copies and the original is not accounted for, and there can be no assumption of delivery by the mere fact of possession, and therefore there is no foundation laid for their introduction; also, upon the further ground, as it appears in the policies themselves, the application was for \$35,000, payable to the San Francisco Milling Company, which is not involved here, and the two \$10,000 policies, and not for five policies, and that, therefore, either these policies are not admissible or the plaintiff must be put to his election as to which \$20,000 he will rely upon.

The objection was overruled; exception allowed; policies introduced in evidence and marked "Plaintiff's Exhibit 3" and "Plaintiff's Exhibit 4."

### III

The court erred in denying the following motion: At the termination of plaintiff's case, defendant's attorney made the following motion:

MR. BOLAND: I will now make a motion for dismissal of the case upon the ground that

it has not been made to appear by any evidence that there was a delivery of any policy with intent to consummate a contract of insurance. I am referring to all of the policies, instead of naming each one, if I may do it that way, your Honor. There is no evidence that there [123] was any delivery of any of the policies with intent to consummate a contract of insurance. There is no evidence of the acceptance of any of the policies by Walter E. Frey, or by anyone on his behalf, with intent to consummate a contract of insurance. There is no evidence that any premium was paid upon any policy. That no policy was delivered to Walter E. Frey, or to anyone on his behalf, or accepted by him or anyone on his behalf. No policy was delivered to Walter E. Frey or to anyone on his behalf while he was in good health. No policy was accepted by Walter E. Frey or anyone on his behalf while he was in good health. No premium upon any policy was paid by said Walter E. Frey or anyone in his behalf while he was in good health. No policy was delivered to Walter E. Frey or to anyone on his behalf, or accepted by him or by anyone on his behalf, or the premium thereon paid, while Walter E. Frey was in good health.

After argument of the motion, plaintiff asked permission, which was granted, to re-open the case.



HERBERT W. ALLEN,

being called as a witness for plaintiff, being first duly sworn, testified as follows:

I am a duly licensed physician, practicing in San Francisco over thirty years, and am a graduate of Johns Hopkins Medical School. I am in the employ of defendant, and have been for something over twenty years. I have a personal recollection of making a physical examination of Walter E. Frey about the 4th day of March, 1932. It was the usual insurance examination. The first thing we do is to obtain the applicant's medical history, family history, moral history, etc. Then we make a physical examination which includes the applicant's height, weight, measurements, heart and lungs, a review of his nervous system and an abdominal examination. I made such an examination on or about March 4, 1932. As far as my examination of Walter E. Frey went, I found no evidence of disease. I found him to be in a normal condition of health and so reported to the defendant. On or about June 1, 1932, I again examined Walter E. Frey in a less extensive manner. I examined his heart and I found nothing abnormal that I could detect, which I reported to defendant.

Thereupon defendant's motion for dismissal was renewed and denied, and an exception allowed as to each policy separately.

## IV

The court erred in overruling defendant's objection to questions as follows:

Q. If I told you, Doctor, that an autopsy surgeon found a heart acutely dilated in all chambers and filled with a dark fluid blood, the heart about one and one-half times its normal size, and there are scattered regions of fibrosis throughout; the coronary vessels of the left side indicate a marked thickening and in the descendens branch about one and one-half inches from its origin there is a complete occlusion by virtue of marked sclerosis of the vessel. [125] There is no acute infarction seen. The coronary vessels of the right side, although thickened to a moderate degree, are in no way comparable to those of the left side. There is some sclerosis at the aortic cusps. The cusps are not flexible. Do these findings necessarily indicate that the person examined was not in good health prior to the time of death?

MR. BOLAND: I object to the question as not comprehensive of the testimony of Doctor Berger. Doctor Berger indicated in his testimony that he had examined the heart during his autopsy and had excluded all the accumulated blood and came to the conclusion that the heart was one and one-half times its normal size for a long period prior to death, and anterior to the time when the application here was signed. Therefore, the question directed to the witness is not comprehensive, and therefore is objec-

tionable. It does not state the testimony as given by Doctor Berger.

THE COURT: Objection overruled; exception.

V

The court erred in denying the motion made by defendant at the termination of the case, as follows:

The testimony being closed, defendant moved the court for a directed verdict in favor of the defendant as to each policy upon each of the following grounds, and the court assented that defendant should not be required to repeat the grounds as to each policy, as follows:

That the preponderance of the evidence does not establish that there was any delivery of [126] any policy with intent to consummate a contract of insurance. That the preponderance of the evidence does not establish, in fact, there is no evidence to establish, that there was any delivery of the policy to the insured, Walter E. Frey; in fact, the evidence discloses that he never, so far as the evidence shows, had his hands on the policy or ever knew that it had been left on the table, as testified, and he was the only party to this contract; Mrs. Steventon and Mr. Herbert Frey, etc., are not parties to the contract at all; the only contract was between Walter Frey and the defendant insurance company. There was no acceptance of any policy by Walter E. Frey, no premium was paid upon any policy by Walter E. Frey, or by anyone on his behalf, or otherwise. No policy

was delivered to Frey, either by manual transmission or with intent to consummate a contract, which is the legal significance of delivery, while he was in good health. No policy was accepted by Walter E. Frey while he was in good health, and no premium on any policy was paid by Walter E. Frey, or by anyone on his behalf while he continued in good health. No policy was ever delivered to Walter E. Frey, or accepted by Walter E. Frey, or premium paid by Walter E. Frey while he was in good health.

The foregoing motion was denied and an exception allowed.

## VI

The court erred in failing and refusing to give the following instructions requested by defendant, to each of which [127] an exception was duly allowed:

(A) In this connection, you are further instructed that the law indulges in the presumption, from the fact that the policy is in the hands of the defendant insurance company, that it was never delivered with the intent that it take effect; and therefore the burden is upon the plaintiff to establish the contrary by a preponderance of the evidence, including the presumption.

(B) Assuming that you find that delivery was complete, that is, that it was not only manual transmission, also an intent that delivery be effective, then you are further in-

structed that such delivery may be rescinded; that is, the parties may agree that such delivery shall be of no effect.

(C) Such rescission of delivery may be established either by parol, that is to say, by verbal agreement between the parties, and not necessarily in writing, or it may be inferred from the conduct of the parties.

(D) On the 4th day of March, 1932, Walter E. Frey made written application of defendant for three policies of insurance upon his life, one for \$35,000.00, payable to San Francisco Milling Company; one for \$10,000.00, payable to Herbert E. Frey, his brother, and one for \$10,000.00, payable to Selma Frey Steventon. This action does not involve any policy for \$35,000.00, nor is it claimed that any such policy was issued or delivered. In said written application said Walter E. Frey stipulated that "the proposed policies shall not take effect unless and until delivered to and received [128] by the insured or beneficiary, during the insured's continuance in good health, and unless and until the first premium shall have been paid, during the insured's continuance in good health." Therefore, as to each policy, before you can find a verdict for the plaintiff, you must be satisfied and find, by a preponderance of the evidence, that the particular policy was delivered to and received by the insured (by which is meant Walter E. Frey) or the beneficiary, during the insured's continuance in



good health, and also that the first premium was paid during the insured's continuance in good health; that is to say, you must find as to each policy both that the policy was delivered and also that the premium was paid thereon during the insured's (by which is meant Walter E. Frey) continuance in good health. It is not sufficient to find alone either that the policy was delivered or that the premium was paid while the insured was in good health, but as to each policy you must find, from a preponderance of the evidence, both that the particular policy was delivered and was accepted, and that the premium thereon was paid while Walter E. Frey continued in good health.

(E) Under the provisions of these policies which are before you, with respect to the condition that none of them shall be effective until and unless the policies respectively be delivered and the premiums paid during the continuance in sound health of Walter E. Frey, you are instructed that such provision is a condition precedent to the taking effect of the policy. [129] The effect of these provisions is to make it a condition that the policy shall not take effect or become valid and binding unless the insured was in fact in sound health at the time the policies were delivered (if you find they were delivered). In this aspect the defendant's obligation is not made to depend upon fraud or misrepresentation, but upon the fact as to whether or not the applicant's health was good

or otherwise. The inquiry then becomes an inquiry as to that fact, and does not depend upon the applicant's knowledge or belief.

(F) You must not become confused between the question of delivery as such and delivery in sound health. In legal contemplation, the two are quite distinct. I have already instructed you with respect to delivery as such; that is, that it must be accompanied with the intent that delivery be effective. I have also instructed you with respect to delivery in sound health. Therefore, if you should find that there was a delivery with intent that it be effective, under the instructions I have already given you, you must, before you can find a verdict for the plaintiff as to any policy, also find that such delivery with intent to make it effective took place, and that the premiums were paid thereon while Walter E. Frey was in sound health. And you are further instructed that if you find that either of these is untrue, that is, that there was no delivery with the intent that the same be effective or that such delivery did not take place while Walter E. Frey was in sound health, then your verdict must be for the defendant as [130] to the particular policy under consideration.

## VII

The court erred in instructing the jury as follows, as to each instruction so given an exception was duly allowed:

(A) The court instructs you that a policy of insurance will, in the absence of evidence to

the contrary, be presumed to take effect upon its date.

(B) The court instructs you that delivery of a policy of insurance is effective by sending the policy to an agent of the company for the sole purpose of making delivery to the insured or the beneficiary.

(C) If it be intended that a policy of insurance should be in force before it is actually handed over, it will be deemed constructively delivered.

(D) If you find that certain policies were executed and mailed from the home office of the insurance company on June 1st and if you further find that it was the intention of the parties that they should go into effect on that date, then you should be warranted in finding that the policies were delivered on June 1st.

(E) The court instructs you that possession of a policy of insurance by the beneficiary is prima facie evidence of its delivery as a valid and existing contract. The plaintiff in this action by producing and putting in evidence the three policies dated the first day of June, 1932, established a prima facie case to recover upon said policies and the burden of overcoming said prima facie case thereupon shifted [131] to the defendant insurance company.

(F) Was it the intention of the parties that the policies should be deemed delivered when they were executed and mailed in New York

June 1st and was the deceased in good health at that time.

(G) After the jury retired the following occurred:

THE COURT: The following note was sent from the Jury to the Court:

“Hon. Judge Kerrigan

“We the Jury in this case request additional instruction having to do with Exhibit ‘J’.

“We desire, your Honor, to know if it was essential that these forms be signed by the applicant on delivery of the policies in order to complete the contract. This refers to the first two policies of \$10,000 each #4591472 #4591473.”

“Gentlemen: My answer is No.

“Frank H. Kerrigan, U. S. Dist. Judge.”

MR. BOLAND: The defendant notes an exception to that.

## VIII

The court erred in accepting and entering the verdict of the jury in favor of plaintiff and against defendant, for the sum of \$20,000.00, to which an exception was duly allowed.

## IX

The court erred in entering judgment upon the verdict of the jury, to which an exception was duly allowed. [132]

## X

The court erred in amending the judgment by adding interest to the amount thereof, to-wit,

\$19,965.60, at the rate of seven per cent per annum from June 13, 1932, until May 22, 1933.

WHEREFORE, defendant prays that the verdict and judgment thereon may be reversed, and for such other and further relief as the court may deem just and proper.

Dated, Sept 11 1933.

F. ELDRED BOLAND  
KNIGHT, BOLAND & RIORDAN,  
Attorneys for Defendant.

Due service and receipt of a copy of the within .....is hereby admitted this 12 day of September, 1933.

NORMAN A. EISNER  
CARL R. SCHULZ  
Attorneys for Plaintiff.

[Endorsed]: Filed Sep 12 1933 [133]

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[Title of Court and Cause.]

ORDER ALLOWING APPEAL

On reading the petition of The Mutual Life Insurance Company of New York, a corporation, defendant in the above-entitled cause, for an appeal from the judgment herein as prayed in said petition it is,

HEREBY ORDERED that the appeal herein be allowed as prayed for, and it is further ordered that a certified transcript of the record and all proceedings be transmitted to the Circuit Court of Appeals of the United States for the Ninth *Dis-*



*trict.* It is further ordered that a cost bond on appeal be fixed at the sum of Two Hundred Fifty dollars.

Dated. Sept 12, 1933.

FRANK H. KERRIGAN

Judge of the United States District Court.

[Endorsed]: Filed Sep 12 1933 [134]

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[Title of Court and Cause.]

AMENDED PRAECIPE FOR TRANSCRIPT  
OF RECORD

To the clerk of the above-entitled court:

Please make up record on appeal heretofore allowed and include therein:

Judgment roll, excepting therefrom all papers on motion for new trial and removal papers, including, however, the complaint and the order for removal.

Bill of exceptions.

Petition for appeal.

Assignments of error.

Order allowing appeal.

Citation on appeal.

Bond on appeal.

Photostatic copy of "Defendant's Exhibit A."

Photostatic copy of "Defendant's Exhibit B."

This praecipe.

Dated, San Francisco, September 13, 1933.

KNIGHT, BOLAND & RIORDAN,

Attorneys for Defendant.

Due service and receipt of a copy of the within is hereby admitted this 13 day of September, 1933.

NORMAN A. EISNER, CARL R. SCHULZ

*Attorneys for Plaintiff.*

[Endorsed]: Filed Sep 13 1933 [135]

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[Title of Court and Cause.]

UNDERTAKING FOR COSTS.

The premium charge on this bond is \$10.00 per annum.

WHEREAS, In an action in the District Court of the United States, for the Northern District of California, a judgment was, on the 22nd day of May, 1933, rendered by the said Court in favor of Herbert E. Frey, Plaintiff in the above-entitled action, and against The Mutual Life Insurance Company of New York, a corporation, defendant in said action, and,

WHEREAS, the said The Mutual Life Insurance Company of New York, a corporation, defendant in said action, is dissatisfied with the said judgment, and is desirous of appealing therefrom to the Circuit Court of Appeals, Ninth Circuit:

NOW, THEREFORE, In consideration of the premises and of such appeal, the UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation, having its principal place of business in the City of Baltimore, State of Maryland, and having a paid-up capital of not less than Two Million Dollars (\$2,000,000.) duly incorporated under the laws of the State of Maryland,

for the purpose of making, guaranteeing and becoming surety on bonds and undertakings, and having complied with all the requirements of the laws of the State of California and the United States of America respecting such corporations, does hereby undertake in the sum of TWO HUNDRED FIFTY (\$250.) DOLLARS, and promise on the part of the Appellant that said Appellant will pay all damages and costs which may be awarded against said Appellant on said appeal or on a dismissal thereof, not exceeding the aforesaid sum of TWO HUNDRED FIFTY (\$250.) Dollars to which amount it acknowledges itself bound.

The undersigned Surety agrees that in case of any breach of any condition hereof the Court may, upon not less than ten days' notice to the undersigned, proceed summarily to ascertain the amount which the undersigned, as Surety, is bound to pay on account of such breach, and render judgment against it and award execution therefor, not to exceed the sum specified in this undertaking.

IN WITNESS WHEREOF, we have hereunto set our hands and seal this 11th day of September, 1933, at San Francisco, California.

UNITED STATES FIDELITY AND  
GUARANTY COMPANY

By ZENA LUSSIER

[Seal]

Attorney-in-Fact.

Approved Sept 12, 1933.

FRANK H. KERRIGAN

U. S. District Judge [136]

State of California,  
City and County of San Francisco.—ss.

On this 11th day of September in the year one thousand nine hundred and thirty-three before me, Thomas A. Dougherty a Notary Public in and for the City and County of San Francisco, personally appeared Zena Lussier known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-fact of the UNITED STATES FIDELITY AND GUARANTY COMPANY, and acknowledged to me that he/she subscribed the name of the United States Fidelity and Guaranty Company thereto as principal, and his/her own name as Attorney-in-fact.

[Seal]

THOMAS A. DOUGHERTY  
Notary Public in and for the City  
and County of San Francisco,  
State of California

My Commission Expires Aug. 4, 1935.

[Endorsed]: Filed Sep 12 1933 [137]

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District Court of the United States  
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT  
OF RECORD ON APPEAL

I, WALTER B. MALING, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 137 pages, numbered from 1 to 137, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of *Herbert E. Frey, v.*

The Mutual Life Insurance Company of New York, No. 19303-K, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$22.75 and that the said amount has been paid to me by the Attorney for the appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 26th day of September A. D. 1933.

[Seal]

WALTER B. MALING

Clerk.

J. P. Welsh,

Deputy Clerk. [138]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America.—ss.

To Herbert E. Frey, Plaintiff:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals, for the Ninth Circuit, to be held in the City and County of San Francisco, State of California, within thirty days from the date of this citation, pursuant to an appeal filed in the Clerk's office for the Southern Division of the United States District Court, for the Northern District of California, whereof the defendant, The Mutual Life Insurance

Company of New York, in the above-entitled cause, is now appellant, and you, as plaintiff in said cause, are now respondent, to show cause, if any there be, why that portion of the verdict and judgment reading as follows:

“We, the jury in the above entitled cause, find a verdict in favor of plaintiff and against defendant and assess the damages in the sum of \$20,000.00 on account of policies No. 4591472-3”;

and which verdict and judgment thereon was amended by order of the court herein. [139]

WITNESS, the Honorable Frank H. Kerrigan, United States District Judge for the Northern District of California, this 12th day of September, 1933.

FRANK H. KERRIGAN,  
United States District Judge. [140]

Due service and receipt of a copy of the within is hereby admitted this 12th day of September, 1933.

CARL R. SCHULZ,  
NORMAN A. EISNER,

For plaintiff.

[Endorsed]: Filed Sep. 13, 1933. Walter B. Maling, Clerk. By J. P. Welsh, Deputy.



In the United States Circuit Court of Appeals for  
the Ninth Circuit.

No. 7297

HERBERT E. FREY,

Plaintiff-Appellee,

vs.

THE MUTUAL LIFE INSURANCE COMPANY  
OF NEW YORK, a corporation,  
Defendant-Appellant.

STIPULATION OMITTING EXHIBITS  
FROM RECORD.

It is hereby stipulated by and between the respective parties hereto, that the amended praecipe filed herein may be further amended so that the policies attached to the original complaint as exhibits may be detached from said complaint, and not become a part of the record herein.

Dated, January 8, 1934.

NORMAN A. EISNER,

CARL R. SCHULZ,

Attorneys for Plaintiff-Appellee.

KNIGHT, BOLAND & RIORDAN,

Attorneys for Defendant-Appellant.

[Endorsed]: Filed Jan. 9, 1934. Paul P. O'Brien,  
Clerk.

[Endorsed]: No. 7297. United States Circuit Court of Appeals for the Ninth Circuit. The Mutual Life Insurance Company of New York, a corporation, Appellant, vs. Herbert E. Frey, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed September 26, 1933.

PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of  
Appeals for the Ninth Circuit.



PLAINTIFF'S EXHIBIT NO. 3

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Policy No. 4,591,473

Age 40 Page 1

Amount, \$10000.

THE MUTUAL LIFE INSURANCE  
COMPANY OF NEW YORK

(First Policy issued February 1st, 1843)

WILL PAY

to the Insured's sister Selma Frey, the Beneficiary, death benefit TEN THOUSAND Dollars, (Face Amount of this Policy) upon receipt of due proof of the death, prior to the Eighth day of March, 1947, (Termination Date) of Walter E. Frey, the Insured.

General Provisions

This Policy also provides for

Optional Modes of Settlement (Section 1),

Annual Dividends (Section 2),

Optional Change to other Forms of Policy  
(Section 3),

Grace in Payment of Premiums (Section 4),

Privilege of Reinstatement (Section 5).

Premiums

This Policy is issued in consideration of the application and of the payment of the first premium of One hundred fifty-two and 20/100 Dollars, receipt of which is hereby acknowledged, and of the payment to the Company annually on each Eighth day of March hereafter during the continuance of this Policy of an annually increasing premium in accordance with the Table of Renewal Premiums on page 2.

The succeeding pages 2 and 3 of this Policy are a part of this contract.

IN WITNESS WHEREOF, the Company has caused this Policy to be executed this Eighth day of March, 1932.

DAVID F. HOUSTON, President.  
(CANCELLED)

WILLIAM L. SIMRELL, Secretary.  
(CANCELLED)

Countersigned (CANCELLED) Registrar.  
32-16—Yearly Renewable Term.

Amount of insurance payable at death within 15 years. Convertible to life, limited payment life, or endowment. Annual dividends. Premiums, increasing annually, payable during continuance.

### Section 1. Optional Modes of Settlement.

The proceeds of this Policy, if it matures as a death claim, may, if so elected, be settled by one of the following optional Modes of Settlement instead of being paid in one sum:—

Page 2

Option 1.—By the Company's holding the proceeds as a principal sum payable at the death of the payee, the Company meanwhile paying monthly interest (with a final interest payment to the date of such death) at three per cent a year plus participation in excess interest at such rate as the Company may determine for each year;

Option 2.—By payment of equal monthly instalments for the number of years elected, in accordance with the table on page 3. Instalments will be

increased by participation in excess interest over three per cent a year at such rate as the Company may determine for each year;

Option 3.—By payment of equal monthly instalments for five, ten, or twenty years certain, as elected, and for the remaining lifetime of the payee, in accordance with the table on page 3. Instalments for the period certain will be increased by participation in excess interest over three per cent a year at such rate as the Company may determine for each year;

Option 4.—By payment of equal monthly instalments of the amount specified in the election as long as the proceeds, together with interest thereon as provided for in Option 1, shall suffice, with a final payment of any balance less than one such instalment.

Under Option 1 the first interest payment will be due at the end of one month from the date when the proceeds become payable. Under Options 2, 3, and 4, the first instalment will be due when the proceeds become payable.

NOTE.—If requested in the election, payment of interest under Option 1 or of instalments under Option 2, 3, or 4 will be made quarterly, semi-annually, or annually instead of monthly. The first payment of interest under Option 1 will be due at the end of three months, six months, or one year according as interest payments are quarterly, semi-annual, or annual. The first instalment under Option 2, 3, or 4 will in all cases be due when the proceeds become payable.



Method of Election. An option Mode of Settlement can be elected, or a previous election revoked or changed, only by written notice to the Company at its Home Office accompanied by the Policy for endorsement.

NOTE.—When a payee becomes entitled to a single sum, he may elect one of these options.

General Provisions.—Joint or contingent payees may be named under the above options within such limitations as may be prescribed by the Company, except that under Option 3 there cannot be joint payees and the instalments to contingent payees will not be payable beyond the period certain.

These optional Modes of Settlement are not available if a corporation, association, partnership, or estate is the payee, nor if the guaranteed interest payments or instalments will, irrespective of dividends or indebtedness, be less than \$10 each.

If any of the above options has been elected, a supplementary contract bearing the date on which the proceeds of the Policy become payable and providing for the settlement elected will be issued.

Surrender or Transfer of Supplementary Contract.—Unless otherwise specified in the election, neither the supplementary contract nor any of the benefits accruing thereunder shall be transferable or subject to surrender, commutation, or encumbrance, except that at the death of the last surviving payee the then surrender value as defined below shall be payable to the executors or administrators of such payee.

The surrender value of the supplementary contract shall be as follows:

Option 1.—The principal sum with any accrued interest:

Options 2 and 3.—The commuted value, computed at three per cent interest compounded annually, of future instalments certain. Under Option 3 no such surrender may be made during the lifetime of the original payee;

Option 4.—Such part of the proceeds of the Policy and interest thereon as shall not have been paid in instalments.

## Section 2. Annual Dividends.

The share of the divisible surplus accruing on this Policy shall be allotted as a dividend annually on each anniversary of its date, the first such dividend being payable only if any premium due on the first anniversary be duly paid.

Each such dividend may be either:—

1. Paid in cash; or,
2. Used toward payment of any premium if the remainder of the premium is duly paid; or,
3. Deposited with the Company at interest within ninety days from date of allotment (called dividend deposit). Interest will be credited at such rate as may be determined by the Company, but never less than three per cent a year, and will be added to existing dividend deposits annually. Dividend deposits existing at the death of the Insured shall be then payable to the beneficiary.

At any time any accumulated dividend deposits may be withdrawn; if not so drawn they shall be

payable at the termination of the Policy.

If none of the options shall be exercised, the dividend will be paid in cash.

Post Mortem Dividend.—Upon the death of the Insured a cash dividend will be credited to this Policy for the fraction of the policy year elapsed before such death.

### Section 3. Change to other Forms of Policy.

Option of Change.—Provided this Policy is in full force and no premium is in default, this Policy may be exchanged, without evidence of insurability, on any anniversary of its date occurring during its continuance, including the termination date, or within thirty-one days after the termination date if the Policy was in force on the termination date and if exchanged during the lifetime of the Insured, for a policy on the Ordinary Life, Limited Payment Life, or Endowment Insurance plan, without Double Indemnity or Waiver of Premium, or other special benefit or feature.

General Provisions.—If a change is made under the above provision of this section, the date of the new policy will be the anniversary as of which such change is made. Such new policy will be for the same face amount as this Policy, will be written at the age of the Insured at nearest birthday on such anniversary, and will be at the rate of premium and with the provisions of the policy then in use by the Company.

### Section 4. Premiums.

Renewal Premiums.—The premiums by the payment of which this Policy may be renewed yearly

on each anniversary of its date prior to the termination date specified on page 1, are those shown in the following Table:

TABLE OF RENEWAL PREMIUMS PER  
\$1,000 FACE AMOUNT OF POLICY

Attained Age Nearest Birthday on Anniversary	Annual Premiums	Attained Age Nearest Birthday on Anniversary	Annual Premiums	Attained Age Nearest Birthday on Anniversary	Annual Premiums
21	\$11.35	36	\$13.92	51	\$22.80
22	11.46	37	14.20	52	24.05
23	11.58	38	14.52	53	25.42
24	11.70	39	14.85	54	26.96
25	11.82	40	15.22	55	28.63
26	11.96	41	15.61	56	30.48
27	12.10	42	16.04	57	32.52
28	12.25	43	16.50	58	34.76
29	12.42	44	17.03	59	37.23
30	12.59	45	17.59	60	39.95
31	12.77	46	18.24	61	42.94
32	12.97	47	18.94	62	46.23
33	13.19	48	19.74	63	49.82
34	13.41	49	20.65	64	53.77
35	13.65	50	21.67		

Semi-annual premium—52% of the annual. Quarterly premium—26½% of the annual. This Policy will terminate on the termination date specified on page 1 but see Section 3 "Change to other Forms of Policy".

The premiums for the face amount of this Policy stated in the Table are based on the net one year term premiums according to the American Experience Table of Mortality assuming interest at the rate of three per cent a year.

General Provisions.—All premiums are payable on or before their due date either at the Home Office of the Company or to any agent of the Company, but only on delivery of a receipt signed by the

Treasurer of the Company and countersigned by the person receiving the premium.

A grace of thirty-one days shall be granted for the payment of each premium after the first, during which days of grace the insurance shall continue in force.

If this Policy shall become payable by the death of the Insured, any unpaid premium or premiums necessary to complete premium payments for the policy year in which such death occurs (including the overdue premium, if death occurs within the days of grace) shall be deducted from the amount payable.

If any premium be not paid before the end of the days of grace, then this Policy shall immediately cease and become void, and all premiums previously paid shall be forfeited to the Company.

#### Section 5. Reinstatement.

This Policy may be reinstated at any time within five years after default in payment of premium but not later than its termination date, upon evidence, satisfactory to the Company, of the Insured's then insurability and the payment of all overdue premiums with compound interest at the rate of five per cent a year.

Page 3

#### Section 6. Miscellaneous Provisions.

**Residence and Travel.**—This Policy is free from restrictions as to residence and travel.

**Occupation.**—This Policy is free from restrictions as to occupation.

**Suicide.**—In the event of the self-destruction of the Insured, whether sane or insane, within one year



after the date of issue of this Policy, the amount payable shall be limited to an amount equal to the premiums paid hereon.

**Incontestability.**—Except for non-payment of premiums, this Policy shall be incontestable after one year from its date of issue unless the Insured dies in such year, in which event it shall be incontestable after two years from its date of issue.

**Misstatement of Age.**—If the age of the Insured shall have been misstated, the amount payable by the Company shall be such as the premium paid would have purchased at the correct age.

**Change of Beneficiary.**—Unless otherwise provided by endorsement on this Policy or unless there be an existing assignment of this Policy other than to the Company, the beneficiary may be changed from time to time, while the Policy is in force, by written notice to the Company at its Home Office accompanied by the Policy for endorsement. Such change shall take effect upon endorsement of the Policy by the Company.

The interest of any beneficiary who dies before the Insured shall vest in the Insured unless otherwise provided in this Policy.

**Rights of the Insured.**—Except as may otherwise be specifically provided in this Policy or by endorsement on this Policy, the Insured may during his lifetime, without the consent and to the exclusion of the beneficiary, receive, exercise, and enjoy every benefit, option, right, and privilege conferred by this Policy or allowed by the Company.

**Policy Settlement.**—All sums payable by the Company under this Policy shall be payable at the



Home Office of the Company in the City of New York.

In any settlement of this Policy at its maturity as a death claim surrender of the Policy to the Company will be required.

The Contract.—This Policy and the application, copy of which is attached, constitute the entire contract.

All statements made by the Insured shall, in the absence of fraud, be deemed representations and not warranties, and no statement shall avoid or be used in defence to a claim under this Policy unless contained in the written application and a copy of the application is attached to the Policy when issued.

Assignment.—The Company shall not be charged with notice of any assignment of any interest in this contract until the original assignment or a certified copy thereof has been filed with the Company at its Home Office.

The Company assumes no responsibility as to the validity or effect of any assignment.

Notice.—No agent or other person except the President, a Vice-President, or a Secretary of the Company has power on behalf of the Company to bind the Company by making any promises respecting benefits or accepting any representations or information not contained in the written application for this Policy, or to make or modify this contract, or to extend the time for payment of a premium, or to waive any lapse or forfeiture or any of the Company's rights or requirements.

### Monthly and Annual Instalments for Each \$1,000 of Proceeds of Policy under Optional Modes of Settlement 2 and 3

The semi-annual and quarterly instalments are 50.37% and 25.26% respectively of the annual instalment

OPTION 2				OPTION 3												
Number of Years Instalments	Each Monthly Instalment	Instalment Each Annual	Age of Payee When Proceeds Payable	5 Years Certain		10 Years Certain		20 Years Certain		Age of Payee When Proceeds Payable	5 Years Certain		10 Years Certain		20 Years Certain	
				Each Monthly Instalment	Each Annual Instalment	Each Monthly Instalment	Each Annual Instalment	Each Monthly Instalment	Each Annual Instalment		Each Monthly Instalment	Each Annual Instalment	Each Monthly Instalment	Each Annual Instalment	Each Monthly Instalment	Each Annual Instalment
2	\$42.86	\$507.59	10 and 11 under	\$3.81	\$44.85	\$3.75	\$44.21	\$3.58	\$42.20	48	35.36	\$62.61	\$5.17	\$60.51	\$4.60	\$54.20
3	28.99	343.23		3.83	45.07	3.77	44.11	3.59	42.36	49	5.45	63.63	5.24	61.40	4.65	54.71
4	22.66	261.19	12	3.85	45.30	3.79	44.02	3.61	42.54	50	5.54	64.70	5.32	62.33	4.65	55.24
5	17.91	212.60	13	3.87	45.54	3.81	44.84	3.62	42.71	51	5.64	65.83	5.41	63.30	4.74	55.77
6	15.14	179.22	14	3.89	45.78	3.83	45.07	3.64	42.90	52	5.74	67.02	5.49	64.30	4.78	56.30
7	13.16	155.83	15	3.91	46.03	3.85	45.29	3.65	43.08	53	5.85	68.26	5.58	65.35	4.83	56.84
8	11.68	138.31	16	3.94	46.27	3.87	45.53	3.67	43.27	54	5.97	69.57	5.66	66.44	4.87	57.37
9	10.53	124.69	17	3.96	46.52	3.89	45.76	3.69	43.47	55	6.09	70.95	5.76	67.57	4.92	57.90
10	9.61	113.82	18	3.98	46.77	3.91	45.99	3.70	43.66	56	6.22	72.40	5.88	68.75	4.96	58.43
11	8.86	104.93	19	4.00	47.02	3.93	46.23	3.72	43.87	57	6.35	73.93	5.98	69.98	5.00	58.95
12	8.24	97.54	20	4.02	47.28	3.95	46.48	3.74	44.07	58	6.49	75.53	6.09	71.24	5.05	59.46
13	7.71	91.29	21	4.05	47.55	3.97	46.74	3.76	44.29	59	6.64	77.22	6.21	72.55	5.09	59.96
14	7.26	85.95	22	4.07	47.84	4.00	47.01	3.78	44.52	60	6.80	78.99	6.32	73.91	5.13	60.45
15	6.87	81.33	23	4.10	48.14	4.02	47.29	3.80	44.75	61	6.96	80.85	6.44	75.31	5.17	60.92
16	6.53	77.29	24	4.12	48.45	4.05	47.59	3.82	45.00	62	7.13	82.81	6.57	76.75	5.20	61.37
17	6.23	73.74	25	4.15	48.77	4.07	47.90	3.84	45.25	63	7.31	84.87	6.70	78.23	5.24	61.80
18	5.96	70.59	26	4.18	49.12	4.10	48.22	3.86	45.51	64	7.51	87.03	6.83	79.75	5.27	62.20
19	5.73	67.78	27	4.21	49.47	4.13	48.56	3.89	45.79	65	7.71	89.31	6.96	81.30	5.30	62.59
20	5.51	65.26	28	4.25	49.85	4.18	48.91	3.91	46.07	66	7.92	91.69	7.09	82.89	5.33	62.94
21	5.32	62.98	29	4.28	50.24	4.19	49.28	3.94	46.37	67	8.14	94.19	7.23	84.50	5.36	63.27
22	5.15	60.92	30	4.32	50.65	4.23	49.66	3.96	46.67	68	8.37	96.81	7.37	86.14	5.38	63.57
23	4.99	59.04	31	4.35	51.08	4.26	50.07	3.99	46.99	69	8.61	99.56	7.51	87.79	5.40	63.84
24	4.84	57.33	32	4.39	51.53	4.30	50.49	4.02	47.32	70	8.86	102.43	7.65	89.46	5.42	64.06
25	4.71	55.76	33	4.43	52.01	4.33	50.93	4.05	47.66	71	9.13	105.44	7.79	91.12	5.42	64.06
26	4.59	54.31	34	4.48	52.50	4.37	51.39	4.08	48.01	72	9.40	108.57	7.93	92.79	5.42	64.06
27	4.47	52.98	35	4.52	53.02	4.42	51.87	4.11	48.38	73	9.69	111.84	8.07	94.44	5.42	64.06
28	4.37	51.74	36	4.57	53.56	4.48	52.38	4.14	48.75	74	9.99	115.25	8.21	96.06	5.42	64.06
29	4.27	50.60	37	4.62	54.13	4.51	52.90	4.17	49.14	75	10.30	118.78	8.34	97.65	5.42	64.06
30	4.16	49.53	38	4.67	54.73	4.55	53.45	4.21	49.54	76	10.62	122.44	8.47	99.21	5.42	64.06
			38	4.73	55.36	4.60	54.03	4.24	49.96	77	10.95	126.22	8.59	100.71	5.42	64.06
			40	4.78	56.02	4.65	54.63	4.28	50.38	78	11.29	130.13	8.71	102.14	5.42	64.06
			41	4.84	56.71	4.71	55.25	4.32	50.82	79	11.64	134.14	8.82	103.51	5.42	64.06
			42	4.91	57.43	4.77	55.91	4.35	51.27	80	12.00	138.25	8.92	104.80	5.42	64.06
			43	4.97	58.19	4.83	56.60	4.39	51.73	81	12.36	142.44	8.92	104.80	5.42	64.06
			44	5.04	58.99	4.89	57.31	4.43	52.20	82	12.73	146.70	8.98	104.80	5.42	64.06
			45	5.12	59.83	4.95	58.06	4.48	52.69	83	13.09	151.00	8.92	104.80	5.42	64.06
			46	5.19	60.73	5.02	58.84	4.52	53.16	84	13.46	155.34	8.92	104.80	5.42	64.06
			47	5.27	61.64	5.09	59.66	4.56	53.68	85	13.83	159.67	8.92	104.80	5.42	64.06

and over



QUESTIONS TO BE ANSWERED BY THE PERSON TO BE INSURED (Whenever the word "insured" is used in this application, it shall be construed as meaning "the person whose life is proposed for insurance.")

THIS APPLICATION is made to THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK HERETICALLY CALLED THE COMPANY. All the following statements and answers are true and are offered to the Company as an inducement to issue the proposed policy. The Insured expressly waives on behalf of himself or herself and of any person who shall have or claim any interest in any policy issued hereunder, all provisions of law forbidding any physician or other person who has attended or examined, or who may hereafter attend or examine the Insured, from disclosing any knowledge or information which he thereby acquires. The proposed policy shall not take effect unless and until delivered to and received by the Insured, the Beneficiary or the person who hereto agrees to pay the premiums, during the Insured's continuance in good health and unless and until the first premium shall have been paid during the Insured's continuance in good health; except in case a conditional receipt shall have been issued as hereinafter provided.

Name in full of Insured: Herbert E. Freely MAR 17 1905  
 Given Name, Middle Name (if any) and Surname

RESIDENCE OF INSURED: No. 500 Street Berry City San Francisco State Cal

PLACE OF BIRTH OF INSURED: No. 500 Street Berry City San Francisco State Cal

Name of firm or employer of Insured: S. F. Melling Co

Present occupation of Insured: salesman

Nature of business of Insured: selling

Other occupations of Insured are: (If none, state None) none

Former occupations of Insured: (If none, state None) same

Where Insured was born at: San Francisco State of Cal Country U.S.

Age of Insured at nearest birthday: 35 years.

Insured is a Citizen or Subject of: U.S.

Send all communications to: 500 Berry at S. F.

1. (a) Amount of insurance applied for \$ 35000 - S. F. Melling Co

(b) Premiums to be paid: 20000 annually Mary wife

9. Plan of insurance (State fully): Yearly Renewable

10. It is agreed that if the Company is unwilling to issue a policy for plan and amount applied for, this application shall be for each plan and amount as may be issued by the Company.

11. Unless otherwise herein specified, policy will be payable to beneficiary if it becomes living, if not living, insured's estate.

(a) Name to fall of Beneficiary: Mary wife

(b) P.O. Address: San Francisco

(c) Relationship to the Insured: Insurable Interest

12. The privilege of changing the beneficiary from time to time, provided by the policy assigned is reserved to the Insured.

13. The right, with or without consent of any other person, to assign, hypothecate, mortgage and options provided in this policy is reserved to the Insured.

14. \$ 20000 in cash has been paid to the Selecting Agent signed by the Secretary of the Company, and cash or other value of equal amount is to be returned to the Insured on the date of the policy.

I am agreed that in the event of the self-destruction of the Insured during the first year following the date of issue of the policy, hereby applied for, whether same or insane, or the death of the Insured, the Company shall be liable to pay the amount of the policy, or a Secretary of the Company has power on behalf of the Company to hold the Company by making any promise respecting benefits under any policy issued hereunder, or any representations or information not contained in this application, or to make, modify or discharge any contract of insurance, or to extend the time for payment of premium, or to waive any lapse or forfeiture or any of the Company's rights or requirements.

This application is made at the instance and request of the undersigned, who, and who shall pay all premiums out of his, her or its funds, and who ratifies the statements, answers and agreements contained in such application to the statements to Medical Examiner.

Signature in full of person or persons who will pay the premiums: Herbert E. Freely

I have known the Insured for 12 years and own 20000 shares of the stock of the Company.

STATEMENTS OF THE INSURED TO MEDICAL EXAMINER.

I am recorded in the handwriting of the Medical Examiner, who should satisfy himself that the Insured's statements and answers are full and complete.

Name: Herbert E. Freely

Illnesses, diseases, injuries and surgical operations have you had since childhood?

Age: 35 years ago

Accident with several fractured ribs in 1920 - no complications.

Fractures on back of neck recently.

Every physician or practitioner who has prescribed for or treated you, or whom you have consulted in the past five years is requested to sign a statement of his or her diagnosis of your condition.

Name of physician or practitioner: Visalli Address: San Francisco When consulted: Recently for Nature of Complaint: fractures.

22. Are you married? Yes

23. (a) To what extent have you used wine, spirits or malt liquors during the past year? (State amount, kind and how much in any one day at the most.) 2-3 drinks regularly

(b) Do you use any of them daily? No

(c) Have you been intoxicated during the past five years? State how often and how recently. No

(d) If a total abstainer, how long have you been so? No

(e) Have you ever taken cure for alcoholic or drug habit? (If so, give date or dates.) No

24. (a) Is there any impairment of vision in the right eye? No

(b) or in the left eye? No

(c) If so, state the cause and the degree of impairment in each eye.

25. Have you ever had any impairment of hearing? No

26. Have you ever been deaf or partially deaf? No

27. Have you any rupture or hernia? No

28. Have you any bodily deformity? No

29. Have you lost any part of your eye? No

30. Have you any impairment of hearing? No

31. Have you ever been in any asylum, hospital or sanitarium for treatment of insanity or other mental or nervous disorder? Yes transiently

32. Have you been under treatment of any kind for any medical or nervous disorder? (State nature of medical observation of any kind within one year for any purpose.) Yes fractures

33. Have you ever changed your residence on account of your health? No

34. Do you contemplate making any change in your residence? (If so, why?) No

35. Has any member of your household suffered from tuberculosis within the past two years? (If so, date when last exposed?) No

36. Has there ever been any suspicion that of any parents, brothers or sisters ever had tuberculosis, insanity, paresis, paralysis or epilepsy? No

Age	Condition of health	If dead	Age	Cause of death	How long ill	Age of grandparents
68	Rachy tuberc	Father	77	Emphysema with		Living Dead
40	Good	Mother	19	apoplectic		Father's father
48	All good	How many brothers (if none dead, no state)				Father's mother
4		How many sisters (if none dead, no state)				Mother's father
32						Mother's mother

I certify that each and all of the foregoing statements and answers were read by me and are fully and correctly recorded by the Medical Examiner.

Signature in full of the Insured: Herbert E. Freely



Page 4

No. 4,591,473

THE MUTUAL LIFE INSURANCE  
COMPANY OF NEW YORK

Annual Dividend

Convertible

Yearly Renewable Term

Policy

On the Life of

WALTER E. FREY

Amount, - - - - \$10000.

Date, March 8th 1932

Term Insurance until

March 8th 1947

Increasing Premiums.

291 S

Yearly Renewable Term

January, 1932.



Policy No. 4,591,472

Age 40

Page 1

Amount, \$10000.

THE MUTUAL LIFE INSURANCE  
COMPANY OF NEW YORK

(First Policy issued February 1st, 1843)

## WILL PAY

to the Insured's brother Herbert Frey, the Beneficiary, death benefit TEN THOUSAND Dollars, (Face Amount of this Policy) upon receipt of due proof of the death, prior to the Eighth day of March, 1947, (Termination Date) of Walter E. Frey, the Insured.

## General Provisions

This Policy also provides for

Optional Modes of Settlement (Section 1),

Annual Dividends (Section 2),

Optional Change to other Forms of Policy  
(Section 3),

Grace in Payment of Premiums (Section 4),

Privilege of Reinstatement (Section 5).

## Premiums

This Policy is issued in consideration of the application and of the payment of the first premium of One hundred fifty-two and 20/100 Dollars, receipt of which is hereby acknowledged, and of the payment to the Company annually on each Eighth day of March hereafter during the continuance of this Policy of an annually increasing premium in accordance with the Table of Renewal Premiums on page 2.

The succeeding pages 2 and 3 of this Policy are a part of this contract.

IN WITNESS WHEREOF, the Company has caused this Policy to be executed this Eighth day of March, 1932.

DAVID F. HOUSTON, President.  
(CANCELLED)

WILLIAM L. SIMRELL, Secretary.  
(CANCELLED)

Countersigned (CANCELLED) Registrar.  
32-16—Yearly Renewable Term.

Amount of insurance payable at death within 15 years. Convertible to life, limited payment life, or endowment. Annual dividends. Premiums, increasing annually, payable during continuance.

### Section 1. Optional Modes of Settlement.

The proceeds of this Policy, if it matures as a death claim, may, if so elected, be settled by one of the following optional Modes of Settlement instead of being paid in one sum:—

Page 2

Option 1.—By the Company's holding the proceeds as a principal sum payable at the death of the payee, the Company meanwhile paying monthly interest (with a final interest payment to the date of such death) at three per cent a year plus participation in excess interest at such rate as the Company may determine for each year;

Option 2.—By payment of equal monthly instalments for the number of years elected, in accordance with the table on page 3. Instalments will be

increased by participation in excess interest over three per cent a year at such rate as the Company may determine for each year;

Option 3.—By payment of equal monthly instalments for five, ten, or twenty years certain, as elected, and for the remaining lifetime of the payee, in accordance with the table on page 3. Instalments for the period certain will be increased by participation in excess interest over three per cent a year at such rate as the Company may determine for each year;

Option 4.—By payment of equal monthly instalments of the amount specified in the election as long as the proceeds, together with interest thereon as provided for in Option 1, shall suffice, with a final payment of any balance less than one such instalment.

Under Option 1 the first interest payment will be due at the end of one month from the date when the proceeds become payable. Under Options 2, 3, and 4, the first instalment will be due when the proceeds become payable.

NOTE.—If requested in the election, payment of interest under Option 1 or of instalments under Option 2, 3, or 4 will be made quarterly, semi-annually, or annually instead of monthly. The first payment of interest under Option 1 will be due at the end of three months, six months, or one year according as interest payments are quarterly, semi-annual, or annual. The first instalment under Option 2, 3, or 4 will in all cases be due when the proceeds become payable.

Method of Election. An option Mode of Settlement can be elected, or a previous election revoked or changed, only by written notice to the Company at its Home Office accompanied by the Policy for endorsement.

NOTE.—When a payee becomes entitled to a single sum, he may elect one of these options.

General Provisions.—Joint or contingent payees may be named under the above options within such limitations as may be prescribed by the Company, except that under Option 3 there cannot be joint payees and the instalments to contingent payees will not be payable beyond the period certain.

These optional Modes of Settlement are not available if a corporation, association, partnership, or estate is the payee, nor if the guaranteed interest payments or instalments will, irrespective of dividends or indebtedness, be less than \$10 each.

If any of the above options has been elected, a supplementary contract bearing the date on which the proceeds of the Policy become payable and providing for the settlement elected will be issued.

Surrender or Transfer of Supplementary Contract.—Unless otherwise specified in the election, neither the supplementary contract nor any of the benefits accruing thereunder shall be transferable or subject to surrender, commutation, or encumbrance, except that at the death of the last surviving payee the then surrender value as defined below shall be payable to the executors or administrators of such payee.

The surrender value of the supplementary contract shall be as follows:

Option 1.—The principal sum with any accrued interest:

Options 2 and 3.—The commuted value, computed at three per cent interest compounded annually, of future instalments certain. Under Option 3 no such surrender may be made during the lifetime of the original payee;

Option 4.—Such part of the proceeds of the Policy and interest thereon as shall not have been paid in instalments.

#### Section 2. Annual Dividends.

The share of the divisible surplus accruing on this Policy shall be allotted as a dividend annually on each anniversary of its date, the first such dividend being payable only if any premium due on the first anniversary be duly paid.

Each such dividend may be either:—

1. Paid in cash; or,
2. Used toward payment of any premium if the remainder of the premium is duly paid; or,
3. Deposited with the Company at interest within ninety days from date of allotment (called dividend deposit). Interest will be credited at such rate as may be determined by the Company, but never less than three per cent a year, and will be added to existing dividend deposits annually. Dividend deposits existing at the death of the Insured shall be then payable to the beneficiary.

At any time any accumulated dividend deposits may be withdrawn; if not so drawn they shall be



payable at the termination of the Policy.

If none of the options shall be exercised, the dividend will be paid in cash.

Post Mortem Dividend.—Upon the death of the Insured a cash dividend will be credited to this Policy for the fraction of the policy year elapsed before such death.

### Section 3. Change to other Forms of Policy.

Option of Change.—Provided this Policy is in full force and no premium is in default, this Policy may be exchanged, without evidence of insurability, on any anniversary of its date occurring during its continuance, including the termination date, or within thirty-one days after the termination date if the Policy was in force on the termination date and if exchanged during the lifetime of the Insured, for a policy on the Ordinary Life, Limited Payment Life, or Endowment Insurance plan, without Double Indemnity or Waiver of Premium, or other special benefit or feature.

General Provisions.—If a change is made under the above provision of this section, the date of the new policy will be the anniversary as of which such change is made. Such new policy will be for the same face amount as this Policy, will be written at the age of the Insured at nearest birthday on such anniversary, and will be at the rate of premium and with the provisions of the policy then in use by the Company.

### Section 4. Premiums.

Renewal Premiums.—The premiums by the payment of which this Policy may be renewed yearly



on each anniversary of its date prior to the termination date specified on page 1, are those shown in the following Table:

TABLE OF RENEWAL PREMIUMS PER  
\$1,000 FACE AMOUNT OF POLICY

Attained Age Nearest Birthday on Anni- versary	Annual Premiums	Attained Age Nearest Birthday on Anni- versary	Annual Premiums	Attained Age Nearest Birthday on Anni- versary	Annual Premiums
21	\$11.35	36	\$13.92	51	\$22.80
22	11.46	37	14.20	52	24.05
23	11.58	38	14.52	53	25.42
24	11.70	39	14.85	54	26.96
25	11.82	40	15.22	55	28.63
26	11.96	41	15.61	56	30.48
27	12.10	42	16.04	57	32.52
28	12.25	43	16.50	58	34.76
29	12.42	44	17.03	59	37.23
30	12.59	45	17.59	60	39.95
31	12.77	46	18.24	61	42.94
32	12.97	47	18.94	62	46.23
33	13.19	48	19.74	63	49.82
34	13.41	49	20.65	64	53.77
35	13.65	50	21.67		

Semi-annual premium—52% of the annual. Quarterly premium—26½% of the annual. This Policy will terminate on the termination date specified on page 1 but see Section 3 "Change to other Forms of Policy".

The premiums for the face amount of this Policy stated in the Table are based on the net one year term premiums according to the American Experience Table of Mortality assuming interest at the rate of three per cent a year.

General Provisions.—All premiums are payable on or before their due date either at the Home Office of the Company or to any agent of the Company, but only on delivery of a receipt signed by the

Treasurer of the Company and countersigned by the person receiving the premium.

A grace of thirty-one days shall be granted for the payment of each premium after the first, during which days of grace the insurance shall continue in force.

If this Policy shall become payable by the death of the Insured, any unpaid premium or premiums necessary to complete premium payments for the policy year in which such death occurs (including the overdue premium, if death occurs within the days of grace) shall be deducted from the amount payable.

If any premium be not paid before the end of the days of grace, then this Policy shall immediately cease and become void, and all premiums previously paid shall be forfeited to the Company.

#### Section 5. Reinstatement.

This Policy may be reinstated at any time within five years after default in payment of premium but not later than its termination date, upon evidence, satisfactory to the Company, of the Insured's then insurability and the payment of all overdue premiums with compound interest at the rate of five per cent a year.

Page 3

#### Section 6. Miscellaneous Provisions.

**Residence and Travel.**—This Policy is free from restrictions as to residence and travel.

**Occupation.**—This Policy is free from restrictions as to occupation.

**Suicide.**—In the event of the self-destruction of the Insured, whether sane or insane, within one year

after the date of issue of this Policy, the amount payable shall be limited to an amount equal to the premiums paid hereon.

**Incontestability.**—Except for non-payment of premiums, this Policy shall be incontestable after one year from its date of issue unless the Insured dies in such year, in which event it shall be incontestable after two years from its date of issue.

**Misstatement of Age.**—If the age of the Insured shall have been misstated, the amount payable by the Company shall be such as the premium paid would have purchased at the correct age.

**Change of Beneficiary.**—Unless otherwise provided by endorsement on this Policy or unless there be an existing assignment of this Policy other than to the Company, the beneficiary may be changed from time to time, while the Policy is in force, by written notice to the Company at its Home Office accompanied by the Policy for endorsement. Such change shall take effect upon endorsement of the Policy by the Company.

The interest of any beneficiary who dies before the Insured shall vest in the Insured unless otherwise provided in this Policy.

**Rights of the Insured.**—Except as may otherwise be specifically provided in this Policy or by endorsement on this Policy, the Insured may during his lifetime, without the consent and to the exclusion of the beneficiary, receive, exercise, and enjoy every benefit, option, right, and privilege conferred by this Policy or allowed by the Company.

**Policy Settlement.**—All sums payable by the Company under this Policy shall be payable at the

Home Office of the Company in the City of New York.

In any settlement of this Policy at its maturity as a death claim surrender of the Policy to the Company will be required.

The Contract.—This Policy and the application, copy of which is attached, constitute the entire contract.

All statements made by the Insured shall, in the absence of fraud, be deemed representations and not warranties, and no statement shall avoid or be used in defence to a claim under this Policy unless contained in the written application and a copy of the application is attached to the Policy when issued.

Assignment.—The Company shall not be charged with notice of any assignment of any interest in this contract until the original assignment or a certified copy thereof has been filed with the Company at its Home Office.

The Company assumes no responsibility as to the validity or effect of any assignment.

Notice.—No agent or other person except the President, a Vice-President, or a Secretary of the Company has power on behalf of the Company to bind the Company by making any promises respecting benefits or accepting any representations or information not contained in the written application for this Policy, or to make or modify this contract, or to extend the time for payment of a premium, or to waive any lapse or forfeiture or any of the Company's rights or requirements.



### Monthly and Annual Instalments for Each \$1,000 of Proceeds of Policy under Optional Modes of Settlement 2 and 3

The semi-annual and quarterly instalments are 53.37% and 35.28% respectively of the annual instalment

OPTION 2				OPTION 3												
Number of Years' Instalments	Each Monthly Instalment	Instalment Each Annual	Age of Payee When Proceeds Payable	5 Years Certain		10 Years Certain		20 Years Certain		Age of Payee When Proceeds Payable	5 Years Certain		10 Years Certain		20 Years Certain	
				Each Monthly Instalment	Each Annual Instalment	Each Monthly Instalment	Each Annual Instalment	Each Monthly Instalment	Each Annual Instalment		Each Monthly Instalment	Each Annual Instalment	Each Monthly Instalment	Each Annual Instalment	Each Monthly Instalment	Each Annual Instalment
9	\$12.86	\$507.30	10 and 11	\$3.81	\$14.85	\$3.75	\$14.41	\$3.58	\$14.30	48	\$5.36	\$62.61	\$5.17	\$60.51	\$4.60	\$54.20
9	28.99	343.23	11 under	3.83	45.67	3.77	44.41	3.59	43.36	49	5.45	63.63	5.24	61.40	4.65	54.71
4	22.06	261.19	12	3.85	45.30	3.79	44.62	3.61	43.54	50	5.54	64.70	5.32	62.33	4.69	55.94
6	17.91	212.09	13	3.87	45.54	3.81	44.84	3.63	43.71	51	5.64	65.83	5.41	63.38	4.74	57.17
8	15.14	179.22	14	3.89	45.78	3.83	45.07	3.64	43.90	52	5.74	67.02	5.49	64.30	4.76	58.20
7	13.16	155.83	15	3.91	46.03	3.85	45.29	3.65	44.08	53	5.85	68.26	5.58	65.35	4.83	59.84
6	11.68	138.31	16	3.94	46.27	3.87	45.53	3.67	44.27	54	5.97	69.57	5.68	66.44	4.87	60.37
9	10.53	124.69	17	3.96	46.52	3.89	45.76	3.69	44.47	55	6.09	70.95	5.78	67.57	4.92	61.30
10	9.61	113.82	18	3.98	46.77	3.91	45.99	3.70	44.66	56	6.22	72.40	5.88	68.75	4.96	62.42
11	8.86	104.93	18	4.00	47.02	3.93	46.23	3.72	44.87	57	6.35	73.93	5.98	69.98	5.00	63.61
19	8.24	97.54	90	1.02	47.28	3.95	46.48	3.74	44.07	58	6.49	75.53	6.09	71.34	5.05	64.86
13	7.71	91.29	91	4.05	47.55	3.97	46.74	3.76	44.29	59	6.64	77.22	6.21	72.55	5.08	66.19
14	7.26	86.94	92	4.07	47.84	4.00	47.01	3.78	44.52	60	6.80	78.99	6.32	73.91	5.13	67.60
16	6.87	81.33	23	4.10	48.14	4.02	47.29	3.80	44.75	61	6.96	80.85	6.44	75.31	5.17	69.22
10	6.53	77.20	24	4.12	48.45	4.05	47.59	3.82	45.00	62	7.13	82.81	6.57	76.75	5.20	70.92
17	6.23	73.74	95	1.15	48.77	4.07	47.90	3.84	45.25	63	7.31	84.87	6.70	78.23	5.24	72.70
16	5.96	70.59	96	4.16	49.12	4.10	48.22	3.86	45.51	64	7.51	87.03	6.83	79.75	5.27	74.60
19	5.73	67.78	97	4.21	49.47	4.13	48.56	3.88	45.79	65	7.71	89.31	6.96	81.30	5.30	76.60
20	5.51	65.26	98	4.25	49.85	4.16	48.91	3.91	46.07	66	7.92	91.69	7.09	82.89	5.33	78.70
21	5.32	62.98	26	4.28	50.24	4.19	49.28	3.94	46.37	67	8.14	94.19	7.23	84.50	5.36	80.90
92	5.15	60.92	30	4.32	50.65	4.23	49.66	3.96	46.67	68	8.37	96.81	7.37	86.14	5.36	83.17
93	4.99	59.04	31	4.35	51.08	4.28	50.07	3.99	46.99	69	8.61	99.58	7.51	87.79	5.40	85.54
94	4.84	57.33	39	4.39	51.53	4.30	50.49	4.02	47.32	70	8.86	102.43	7.65	89.46	5.42	88.00
95	4.71	55.76	33	4.43	52.01	4.33	50.93	4.05	47.66	71	9.13	105.44	7.79	91.15	5.42	90.44
96	4.59	54.31	34	4.48	52.50	4.37	51.39	4.08	48.01	72	9.46	108.57	7.93	92.79	5.42	92.90
97	4.47	52.98	36	4.52	53.02	4.42	51.87	4.11	48.38	73	9.89	111.84	8.07	94.44	5.42	95.40
98	4.37	51.74	38	4.57	53.56	4.46	52.38	4.14	48.75	74	10.30	115.25	8.21	96.06	5.42	97.90
20	4.27	50.60	37	4.62	54.13	4.51	52.90	4.17	49.14	75	10.80	118.78	8.34	97.65	5.42	100.40
30	4.18	49.53	38	4.67	54.73	4.55	53.45	4.21	49.54	76	11.36	122.44	8.47	99.21	5.42	102.90
			39	4.73	55.36	4.60	54.03	4.24	49.96	77	10.95	126.23	8.59	100.71	5.42	105.40
			40	4.78	56.02	4.65	54.63	4.28	50.38	78	11.29	130.13	8.71	102.14	5.42	107.90
			41	4.84	56.71	4.71	55.28	4.32	50.82	79	11.64	134.14	8.82	103.51	5.42	110.40
			42	4.91	57.43	4.77	55.91	4.35	51.27	80	12.00	138.25	8.92	104.89	5.42	112.90
			43	4.97	58.19	4.83	56.60	4.39	51.73	81	12.36	142.44	8.92	106.29	5.42	115.40
			44	5.04	58.99	4.89	57.31	4.43	52.20	82	12.73	146.70	8.92	107.69	5.42	117.90
			45	5.12	59.83	4.95	58.08	4.48	52.69	83	13.09	151.00	8.92	109.09	5.42	120.40
			46	5.19	60.71	5.02	58.84	4.52	53.18	84	13.46	155.34	8.92	110.49	5.42	122.90
			47	5.27	61.64	5.09	59.66	4.56	53.68	85	13.83	159.77	8.92	111.89	5.42	125.40

and over





Page 4

No. 4,591,472

THE MUTUAL LIFE INSURANCE  
COMPANY OF NEW YORK

Annual Dividend

Convertible

Yearly Renewable Term

Policy

On the Life of

WALTER E. FREY

Amount, - - - - \$10000.

Date, March 8th 1932

Term Insurance until

March 8th 1947

Increasing Premiums.

291 S

Yearly Renewable Term

January, 1932.

[Endorsed]:

United States District Court. No. 19303. Frey  
vs. Mut. Pltf. Exhibit No. 3.

Filed 5/18/33. Walter B. Maling, Clerk. By  
S.T.M Deputy Clerk.

No. 7297. United States Circuit Court of Ap-  
peals for the Ninth Circuit.

Filed Sep 26 1933 Paul P. O'Brien, Clerk.

## PLAINTIFF'S EXHIBIT NO. 4

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June 27, 1932.

FOR VALUE RECEIVED, I hereby assign and transfer to Herbert E. Frey all my claim and demand against the Mutual Life Insurance Company of New York arising out of and/or under a certain policy of insurance issued to me as beneficiary upon the life of Walter E. Frey in the sum of Five Thousand Dollars (\$5,000.00) and dated on or about the first day of June, 1932.

JOHN J. STEVENTON

June 27, 1932.

FOR VALUE RECEIVED, I hereby assign and transfer to Herbert E. Frey all my claim and demand against the Mutual Life Insurance Company of New York arising out of and/or under a certain policy of insurance issued to me as beneficiary upon the life of Walter E. Frey in the sum of Ten Thousand Dollars (\$10,000.00) and dated on or about the ninth day of March, 1932.

SELMA STEVENTON

[Endorsed]:

United States District Court. No. 19303. Frey vs. Mutual. Pltf. Exhibit No. 4.

Filed 5/18/33. Walter B. Maling, Clerk. By S.T.M., Deputy Clerk.

No. 7297. United States Circuit Court of Appeals for the Ninth Circuit.

Filed Sep. 26, 1933. Paul P. O'Brien, Clerk.

Have Old Spoken & Transfer made  
over into (2) bonds on each.  
life - Walter's to be cancelled  
& replaced with new term insurance.

Walter's policy to be taken over  
by W. H. F. & S. F.  
to replace Walter's policy

W. H. F. Walter's Fund

No. 19303

Every on Mutual - Life - Ins (107)  
Pitts Fund No. 5

May 19, 1933

John J. Mahoney

NO. 19303  
UNITED STATES DEPARTMENT OF BANKS  
FOR THE SUPPLY OF CURRENCY  
FILED

SEP 26 1933

PAUL P. O'BRIEN,  
CLERK





PLAINTIFF'S EXHIBIT NO. 6

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THE MUTUAL LIFE INSURANCE COMPANY  
OF NEW YORK

W. L. Hathaway,  
Manager,  
19th Floor, Hunter-Dulin Bldg.,  
111 Sutter Street.

San Francisco, Cal., April 16, 1932

Mr. Herbert Frey

San Francisco, California

Dear friend Herbert:

I forgot to give you last night the assignments necessary to assign these policies absolutely, so that they will be payable to the San Francisco Milling Co. Ltd. When you have these proper signatures made out I will attend to the witnessing of same. As you know, you have a receipt from the company for the full first years premiums on these policies and I trust you will be able to secure for me the company's note for the total amount, so that we may then proceed to get some more insurance issued. I have already explained to you why this thing must be worked in this way.

With best regards,

Very truly yours,

L. A. STEINFELD,

City Manager

[Endorsed]:

United States District Court. No. 19303. Frey vs. Mutual Life Ins. Co. Pltf's Exhibit No. 6.

Filed May 19, 1933. Walter B. Maling, Clerk. By John J. Fahey, Deputy Clerk.

No. 7297. United States Circuit Court of Appeals for the Ninth Circuit.

Filed Sep. 26, 1933. Paul P. O'Brien, Clerk.



## DEFENDANT'S EXHIBIT NO. A.

(Whenever the word "Insured" is used in this application it shall be construed as "the person whose life was or is to be insured by the under-mentioned policy.")

THE MUTUAL LIFE INSURANCE COMPANY  
OF NEW YORK

Home Office, 32-34 Nassau Street,  
New York City, N. Y.

APPLICATION FOR ESTABLISHING OR  
REINSTATING POLICY

With Medical Examination

Each Question Must be Answered

Initial Premium—#414

Attached to Application Jun 3 - 1932. B/A. P.  
W. Herold.

Initial not estab.

To be filled in at Agency.

A—Initial premium paid.....	19
B—Lapsed for premium due .....	19
Overdue premium to .....	19
and interest paid on .....	19
Overdue premium was extended to.....	19
Policy was surrendered .....	19

G. W. MURRAY

Agency Cashier.

To be filled in at Home Office.

Premium and interest paid to.....192.....

Policy surrendered for non-payment of loan due

.....

.....

For Auditor

Policy No. 4600 870-1 on the life of Walter E. Frey.

I (or we) hereby request The Mutual Life Insurance Company of New York to Establish or Re-instate, as the case may be, the above numbered policy, it being agreed that such Establishment or Re-instatement shall not take effect until this application shall have been finally approved at said Company's Home Office, and (a) the first premium or (b) the overdue premium or premiums and interest on loan, if any, with interest thereon to date of payment shall have been paid; that if this application be declined said Company will, upon surrender of any receipt or acknowledgment given therefor, return any payment made in connection with this application.

1. What is the occupation of the Insured? (Full details, business or trade and name of firm, and length of time so engaged.) Milling.

2. Has the Insured (I) since the date of the original application if a new policy is to be established, or (II) since the original due date of the first premium now in default, (or since the policy was surrendered or otherwise terminated, no premium being then in default) if a policy is to be reinstated:

(a) Made any aviation flights or aeronautical ascensions? (If so, give dates and full details.) (If none, so state) None.

(b) Made an application or submitted to an examination for life insurance upon which a policy has not been issued on the plan and premium rate originally applied for, or been refused restoration of insurance that had lapsed? (If so, give names of companies or associations.) (If not, state "No.")  
No.

(c) Had any illness, disease, impairment of health, surgical operation, or physical examination or laboratory test, or been prescribed for, treated by or consulted a physician, surgeon or practitioner? (If so, give details of each and the name of each physician, surgeon or practitioner.) (If none, so state.) .....

Nature of illness, disease, etc., None.

Number of attacks

Date of each

Any remaining effects

Date of complete recovery

Name of Physician or Practitioner

Address of Physician or Practitioner

I (or we) agree on my own behalf and on behalf of every person who has or shall have any interest in said policy that the foregoing statements and answers, and the statements and answers made to the Company's Medical Examiner, are true and are offered to The Mutual Life Insurance Company of New York as an inducement to (a) establish or (b) reinstate (as the case may be) said policy, and further that the same are material to the risk which the Company is asked to assume by establishing or

reinstating said policy. If this is an application for establishing the above numbered policy I (or we) also affirm all the representations, statements, answers and agreements made in the application upon which said policy is to be issued, and those made to the Company's Medical Examiner in continuation of said application.

All communication should be sent to the following Post Office address (Street and Number or R. F. D.) 500 Berry St. (City or Town) San Francisco (County) (State or Province) Cal.

Dated at San Francisco this 1 day of June 1932.

WALTER E. FREY

Signature in full of the Insured, who must sign in the presence of a witness.

.....  
Signature in full of person or persons other than the Insured who will pay the premiums who must sign in the presence of a witness.

I certify that the above statements were read, approved, and signed by the Insured, in my presence.

H. W. ALLEN, M. D.

Witness

I certify that the above statements were read, approved, and signed by the person who will pay the premiums, in my presence.

.....  
Witness

Unless the policy was issued at the instance and request of some one other than the person insured and who will pay the premiums the signature of the Insured alone will be sufficient.

Note to Medical Examiner: If any impairment is found give full details including date—duration—and date of complete recovery.

The Company will pay the medical fee of \$3.00 when the restoration of a lapsed or surrendered policy is involved for the first time. Any subsequent restoration or examination to establish a new policy must be without expense to the Company.

This Policy may be delivered free from medical restrictions. Jun 1, 1932. H. W. Allen, Medical Referee.

[Endorsed]:

No. 7297. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep 26 1933. Paul P. O'Brien, Clerk.

United States District Court. No. 19303. Frey v. Mut. Defs. Exhibit No. A. Filed 5/18/33. Walter B. Maling, Clerk. By S. T. M.

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DEFENDANT'S EXHIBIT NO. C

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AVIATION FORM

Attached to Application Mar. 11, 1932. B. of A.—  
W. Allan.

Supplement to my application for insurance to  
The Mutual Life Insurance Company of New York  
San Fran. Agency 414

Appl. or Pol. number 3/5/32 Date

1. Are you connected in any way with airway operations or airplane manufacture? If so, give full details as to duties and length of time so engaged. No.
2. Have you taken any flights during the past three

years? If so, list the record of these flights, as required below.

No.

IT IS UNDERSTOOD THAT EACH TAKE-OFF WITH LANDING CONSTITUTES A FLIGHT.

(Example: Taking off from one point and making two stops and take-offs before reaching objective point makes three flights.)

Year	How Many Flights Taken as Passenger	How many Flights Taken as Pilot	How Many Hours in the Air	No. of Miles Flown
1929	9	none	9	1000
1930	9	none	9	1000
1931	6	none	6	600

Current

Year to

Date None to date

3. What was the purpose of the flights? (State whether for business, pleasure or for instruction.) Business only.
4. (a) If your flying is done as a passenger only (not as a pilot), is it done on regularly scheduled lines Scheduled lines except taxi flights mentioned or on special taxi trips? 2 taxi trips 1929—2 taxi trips 1930 both included in above.
- (b) What type plane is used?.....
- (c) Is the pilot licensed? Yes.
5. (a) Are you a licensed pilot? No.
- (b) If so, what type aircraft do you fly? None.
6. If not a licensed pilot, have you had or do you contemplate instruction in piloting an airplane or other aircraft? No.



7. Do you own an airplane? If so, what make is it?  
 No.  
 What year was it built?.....  
 How long have you had it?.....  
 Do you pilot it yourself or have you a licensed  
 pilot to fly it?.....
8. (a) How much flying are you likely to do with-  
 in the next year? About same as in past.  
 May make occasional flights this coming  
 summer with friend who owns private plane.
- (b) What will be the purpose of these flights  
 (business, pleasure or for instruction?)  
 business.

HAVE YOU ANSWERED ALL OF THE  
 ABOVE QUESTIONS?

W. E. FREY,

Signature of Applicant

L. A. STEINFELD,

Witness.

Mar. 8, 1932

Date

[Endorsed]:

United States District Court. No. 19303. Frey  
 vs. Mut. Deft. Exhibit No. C.

Filed 5/18/33. Walter B. Maling, Clerk. By  
 S.T.M., Deputy Clerk.

No. 7297. United States Circuit Court of Ap-  
 peals for the Ninth Circuit.

Filed Sep. 26, 1933. Paul P. O'Brien, Clerk.

DEFENDANT'S EXHIBIT NO. D.

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4591471 to 4591473

THE MUTUAL LIFE INSURANCE COMPANY  
OF NEW YORK

Bureau of Applications  
34 Nassau Street  
New York

This letter of advice does not modify nor change  
any existing rules

March 8th, 1932

SUBJECT

Manager at San Francisco, Cal.

Referring to application #414—Walter E. Frey  
delivery of policy (ies), herewith, is subject to  
Inspector's report. Policies must not be delivered  
until released from Home Office.

A. D. REILEY,

Supervisor of Risks.

NOTE:—All information regarding applications,  
no matter by what department asked for, should  
be sent direct to the Bureau of Applications.

[Endorsed]:

United States District Court. No. 19303. Frey  
vs. Mutual. Deft. Exhibit No. D.

Filed 5/18/33. Walter B. Maling, Clerk. By  
S.T.M., Deputy Clerk.

No. 7297. United States Circuit Court of Ap-  
peals for the Ninth Circuit.

Filed Sep. 26, 1933. Paul P. O'Brien, Clerk.

## DEFENDANT'S EXHIBIT NO. E

CALIFORNIA HAWAIIAN MILLING CO.

Incorporated

Hay, Grain and Alfalfa Products

330 Ritch Street

San Francisco, California

Telephone KEarny 5529

Cable Address "Ajax"

Standard Codes

## Members

San Francisco Chamber of Commerce

San Francisco Grain Trade Association

Grain and Feed Dealers

National Association

April 4th, 1932

Mutual Life Insurance Co. of New York,

San Francisco,

California.

Gentlemen:

Regarding my recent application for insurance:

Supplementary to the aviation form which I recently furnished you in connection with my application in which I informed you that "I may make occasional flights this coming summer with friends who own a private plane." Since that time I have definitely made up my mind that I will not make any such flights, and will strictly confine any flights that I do make on regular commercial air lines, with licensed pilots between definitely established air ports.

I do not think it is fair that I should be held to this statement indefinitely and I therefore now agree not to do any flying in other than regular commercial planes, as above stated, for a period of two years from date. The chances are it will be of an indefinite nature, as the plane in which I had a vague idea that sometime I may possibly have gone up in, has since been destroyed by fire.

My reason for change in attitude at this time is that I have learned that the Insurance Companies do not look with favor upon risks who do other than commercial air line flying, and as I have made no definite plans to take these flights, and as it was merely a possibility that I might do so at some time, I would much rather put myself on record as stating that I will not make such flights for two years, for keeping my insurance in good standing is much more value to me than making an occasional flight outside of commercial air line flying.

Yours truly,

WEF/MK

W. E. FREY

[Endorsed]:

United States District Court. No. 19303. Frey v. Mut. Def. Exhibit No. E. 5/18/33. Walter B. Maling, Clerk. By S. T. M., Deputy Clerk.

No. 7297. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep 26 1933. Paul P. O'Brien, Clerk.

Recalled and Declined

DEFENDANT'S EXHIBIT NO. F.

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THE MUTUAL LIFE INSURANCE COMPANY  
OF NEW YORK

Bureau of Applications  
34 Nassau Street  
New York

This letter of advice does not modify nor change  
any existing rules

3-15-32

Manager at San Francisco, Cal.

Referring to application #414 W. E. Frey under which we wrote policy (ies) 4591471-2-3 we regret to advise you that we require the return of above policy (ies) to Accounting Department for cancellation, the risk having been declined, in view of information received.—24-8

A. D. REILEY,

Supervisor of Risks.

NOTE:—All information regarding applications, no matter by what department asked for, should be sent direct to the Bureau of Applications.

Received Mar 18 1932. W. L. Hathaway, Manager

[Endorsed]:

United States District Court. No. 19303. Frey vs. Mut. Deft. Exhibit No. F.

Filed 5/18/33. Walter B. Maling, Clerk. By STM, Deputy Clerk.

No. 7297. United States Circuit Court of Appeals for the Ninth Circuit.

Filed Sep. 26, 1933. Paul P. O'Brien, Clerk.





We regret we can make no change in decision declining insurance in favor of corporation. (8)

[Endorsed]:

United States District Court. No. 19303. Frey vs. Mut. Deft. Exhibit No. G.

Filed 5/18/33. Walter B. Maling, Clerk. By S.T.M. Deputy Clerk.

No. 7297. United States Circuit Court of Appeals for the Ninth Circuit.

Filed Sep. 26, 1933. Paul P. O'Brien, Clerk.

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DEFENDANT'S EXHIBIT No. H

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Appn. #414

#4600870-1

#414

Walter E. Frey

TO THE MUTUAL LIFE INSURANCE  
COMPANY OF NEW YORK

Anything in this Policy to the contrary notwithstanding, it is understood and agreed that if the Insured shall, within one year after the date of issue of this Policy, make any flight in an aeroplane or any other kind of flying machine or make any balloon ascension, except as part of his duties while engaged in the military or naval service of the United States of America or the Dominion of Canada or except as a fare-paying passenger in a licensed passenger aircraft provided by an incorporated passenger carrier and operated by a licensed pilot on a regular passenger route between definitely established airports, this Policy shall be null and void but such part of any premium as

shall have been paid for the period from the date on which the Insured made such flight or ascension to the due date of the next.....annual premium shall be returned without interest.

Dated at San Francisco this 14th day of April, 1932.

L. A. STEINFELD,  
Witness

W. E. FREY,  
Insured

32-549

Beneficiary

Files Apr. 22, 1932. Filed by.....

Files May 6, 1932. Filed by E.R.C.

(To be filed with application Apr 16 Bureau of Applications.)

[Endorsed]:

United States District Court. No. 19303. Frey vs. Mut. Deft. Exhibit No. H.

Filed 5/18/33. Walter B. Maling, Clerk. By STM, Deputy Clerk.

No. 7297. United States Circuit Court of Appeals for the Ninth Circuit.

Filed Sep. 26, 1933. Paul P. O'Brien, Clerk.

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DEFENDANT'S EXHIBIT NO. I

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Read Instructions. Use care in filling in blank spaces. Read carefully before executing.

INSTRUCTIONS:—(1) SEE PROOF OF EXECUTION BY A CORPORATION BELOW:—

When executed by a Corporation, the Corporate Seal must be affixed to this instrument. This instrument should be executed by the President, Vice-

President, or Treasurer. A certified copy of the resolution of the Board of Directors giving him authority to execute this instrument must be furnished.

(2) In the acknowledgment, where marked with a red star (\*) fill in "NOTARY" or whatever may be the official designation of the officer before whom the acknowledgment is taken.

(3) The officer before whom the acknowledgment or proof of execution is taken must affix his official seal. If he has no seal, a County Clerk's Certificate must be furnished, showing officer's authority to act.

Form 3602-7500-3-31

Absolute Assignment.

Edition Apr. 1927.

Both the original and duplicate instruments must be sent to the Company.

#### ORIGINAL ASSIGNMENT

The duplicate will be retained at the Home Office and the original will be returned with the Registrar's acknowledgment.

For One Dollar, to me/us in hand paid, and for other valuable considerations (the receipt of which is hereby acknowledged) I/we hereby assign, transfer and set over to (relationship to the insured, if any, should be stated) San Francisco Milling Company, Ltd., as their interest may appear, whose P. O. Address is San Francisco, Calif. all my/our right, title and interest in policy No. 4600,870 issued by

THE MUTUAL LIFE INSURANCE COMPANY  
OF NEW YORK,

and for the consideration above expressed I/we do also for myself/ourselves my/our executors and administrators/successors, guarantee the validity and sufficiency of the foregoing assignment to the above named assignee , his/her/their executors, administrators/successors or assigns, and his/her/their title to the said policy will forever warrant and defend.

..... [Seal]  
HERBERT E. FREY [Seal]

IN WITNESS WHEREOF, I/we have hereunto set my/our hand and seal , this..... day of .....19.....

Acknowledgment by an individual

State of.....  
County of.....—ss.

On this.....day of....., in the year 19 , before me the undersigned, \*a..... residing in....., duly commissioned and thereunto authorized, came .....to me known and known to me to be the individual described in and who executed the foregoing assignment, and acknowledged that.....executed the same.

(Notary sign here) .....

\*Notary see "Instructions" 2 and 3 at top of Original Assignment.

Proof of Execution by a Corporation

(See at Top Instruction 1)

State of.....

County of.....—ss.

On this.....day of....., in the year 19 , before me personally came.....  
 .....to me known, who, being by me duly sworn, did depose and say that he resides in.....; that he is the.....of....., the corporation described in and which executed the foregoing assignment; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

(Notary sign here) .....

\*Notary see "Instructions" 3 at top of Original Assignment.

**ACKNOWLEDGMENT** The duplicate of this original instrument has been noted and filed subject to all claims, liens and indebtedness, if any, existing in favor of the Company against above policy. The Company assumes no responsibility as to the validity or effect of the said instrument.

(Illegible)

Registrar.

Per.....

Form 3602-7500-3-31

File with Appn.

Absolute Assignment.

for

Edition Apr. 1927.

Registrar

To be filled in at Agency before sending to  
 Home Office

From	Premiums
Agency	Paid to
	Agency
Date	Cashier

Use care in filling in blank spaces.  
 Read carefully before executing.

**DUPLICATE ASSIGNMENT.**

For One Dollar, to me/us in hand paid, and for other valuable considerations (the receipt of which is hereby acknowledged) I/we hereby assign, transfer and set over to (relationship to the insured, if any, should be stated) San Francisco Milling Company, Ltd., as their interest may appear whose P. O. Address is San Francisco, Calif. all my/our right, title and interest in policy No. 4600,870 issued by THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

and for the consideration above expressed I/we do also for myself/ourselves my/our executors and administrators/successors, guarantee the validity and sufficiency of the foregoing assignment to the above named assignee , his/her/their executors, administrators/successors or assigns, and his/her/their title to the said policy will forever warrant and defend.

HERBERT E. FREY [Seal]  
 ..... [Seal]

In witness whereof, I/we have hereunto set my/our hand and seal, this.....day of.....  
 19.....

Acknowledgment by an individual.

State of.....  
 County of.....—ss.

On this.....day of....., in the year 19 , before me the undersigned, \*a.....

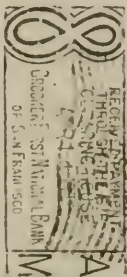




April 11 1932 No.

**STOPPED**

Pay to the order of *Paul P. O'Brien* \$182.<sup>00</sup>  
*Eighty two and 00/100*  
*Paul P. O'Brien*



PAY TO THE ORDER OF  
Crocker First National Bank  
OF SAN FRANCISCO  
THE LIFE LIFE INSURANCE CO.  
OF NEW YORK  
G. W. MURRAY, Agency Cashier

RETURNED UNPAID

DEPOSITOR NOTIFIED BY TELEPHONE  
WILL CALL AT CITY COLLECTION DEPARTMENT  
FOR THIS ITEM.

RECLAMATION DEPARTMENT

*Mutual F.D.A.*

14 1932

No. \_\_\_\_\_

37 April 11 1932

*Bank of California*

**STOPPED**

Pay to the order of *Paul P. O'Brien* \$163.<sup>80</sup>

*Eighty three and 80/100*

*Paul P. O'Brien*

Dollars

Form 410



PAY TO THE ORDER OF  
Clerk  
Crocker First National Bank  
OF SAN FRANCISCO  
THE LIFE LIFE INSURANCE CO.  
OF NEW YORK  
G. W. MURRAY, Agency Cashier

FILED  
SEP 26 1933  
PAUL P. O'BRIEN



DEFENDANT'S EXHIBIT NO. L

Copy for Manager's Office.

Registrar's Subject Letter

NEW BUSINESS SUBJECT FORM

This advice does not modify nor change any  
existing rules.

To the Manager at San Francisco.

From G. TROWBRIDGE,

Assistant Secretary and Registrar

Date June 1, 1932

The enclosed policy (ies) No. 4600870—4615420-1  
Insured's name Walter E. Frey must not be delivered or the first premium accepted thereon until and unless the request written below HAS BEEN EXECUTED BY THE INSURED.

This form, when properly executed as above, is to be returned to the REGISTRAR'S DIVISION at the Home Office.

G. TROWBRIDGE

Asst. Secretary and Registrar.

THE MUTUAL LIFE INSURANCE COMPANY  
OF NEW YORK

Home Office, 34 Nassau Street, New York, N. Y.

.....19.....

To the Mutual Life Insurance Company of  
New York:

Referring to the above numbered policy(ies) the undersigned hereby accepts the said policy(ies) issued as follows:

With the Right, without consent of any other person, to change the beneficiary and to Loan and Surrender Values and to Dividends and options provided in the policy, reserved to the Beneficiary.

---

Signature in full of the Insured.  
(Always required.)

---

Signature in full of the person or persons who will pay the premiums. (To be executed only when the application is made at the instance and request of some one other than the Insured, and who will pay the premiums.) (If a corporation, an officer other than Insured, to sign for corporation, Show Title.)

[Endorsed]:

United States District Court. No. 19303. Frey vs. Mut. Deft. Exhibit No. L.

Filed 5/19/33. Walter B. Maling, Clerk. By STM, Deputy Clerk.

No. 7297. United States Circuit Court of Appeals for the Ninth Circuit.

Filed Sep. 26, 1933. Paul P. O'Brien, Clerk.